No. 20,719

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,
Appellants,

vs.

PACIFIC MARITIME ASSOCIATION,
a non-profit corporation, et al.,
Appellees.

BRIEF FOR APPELLANTS

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I

STATEMENT OF JURISDICTION

Plaintiffs and appellants (hereinafter referred to as "plaintiffs") brought this action in the District Court against the defendants and appellees (hereinafter referred to as "defendants") alleging in their Fourth Amended Complaint, in substance, that plaintiffs were longshoremen in the Port of San Francisco, employed by defendant Pacific Maritime Association (hereinafter referred to as "P.M.A.") and were members of a bargaining unit whose certified collective bargaining representatives were defendants International Longshoremen's and Warehouse-

men's Union and I.L.W.U. Local No. 10 (hereinafter referred to as "union defendants"); that the union defendants, with the cooperation of defendant P.M.A. violated their duty to fairly represent plaintiffs in negotiating and administering the collective bargaining agreement; that defendants breached the specific terms of the collective bargaining agreement; and that as a result of the wrongful conduct of defendants, plaintiffs were removed or "deregistered" from the employment lists and prevented from working as longshoremen and from advancing to a higher employment category. It was further alleged that the individual defendants conspired together in performing these wrongful acts. Plaintiffs prayed for both injunctive relief and money damages. The District Court dismissed the Fourth Amended Complaint without leave to amend, primarily for lack of jurisdiction, and plaintiffs appealed to this Court. Plaintiffs contend that the District Court had jurisdiction to hear the cause under § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185, and 28 U.S.C.A. § 1337. This Court has jurisdiction by virtue of 28 U.S.C.A. § 1291.

II

STATEMENT OF THE CASE

A. Background of the Cause

Plaintiffs commenced their employment as longshoremen in the months of June and August, 1959. Their employer, defendant P.M.A., is a multi-em-

ployer bargaining representative of the major stevedoring companies on the Pacific Coast, and an employer within the meaning of § 2(2) of the Labor Management Relations Act, 29 U.S.C.A. §§ 141 *et seq.* The defendant International Longshoremen's and Warehousemen's Union is the certified collective bargaining representative for longshore employees on the Pacific Coast, and recognized as such under § 2(5) of the Act. I.L.W.U. Local No. 10 is the International Union's local affiliate in San Francisco. Plaintiffs are not now and have never been members of the union.

Over the past thirty years, defendants have negotiated and entered into a series of collective bargaining agreements. The most recent such agreement at the time of the District Court proceedings was the "Pacific Coast Longshore Agreement 1961-1966". A copy of this agreement appears at R. 4.*

The agreement provides for two classifications of longshoremen: full registration and limited registration. First preference of employment and dispatch is given to fully registered longshoremen, and second preference is given to limited registered men (§ 8.41). The agreement further provides for the establishment of joint committees in each port composed of representatives of the employer and the union (§ 17.1). These port committees, called "Joint Port Labor Relations Committees," have authority to establish local rules governing the day-to-day operation of the con-

*Citations to the record will be in this form, thus, "R. 4" refers to Record, p. 4.

tract. In 1958, the Port Committee in San Francisco issued a memorandum entitled "Memorandum of Rules Governing Registration and Deregistration of Longshoremen in the Port of San Francisco, March 18, 1958". A copy of this memorandum, hereinafter referred to as the "1958 Rules" was attached to the Fourth Amended Complaint, marked Exhibit "A", and appears at R. 123-130. Under the terms of the 1958 Rules, longshoremen having full registration are designated Class "A" and longshoremen having limited registration are designated Class "B". The 1958 Rules, as well as other memoranda subsequently issued by the Port Committee, established the practice and procedure for advancement of longshoremen from the Class "B" list to the Class "A" list. These rules were established by defendants under the terms of the collective bargaining agreement in effect prior to the present agreement.

On or about June 17, 1963, plaintiffs were notified of their (individual) summary deregistrations by the Joint Port Labor Relation Committee, allegedly because of certain violations of recently adopted work rules, the "1963 Rules". (R. 2, 113.) What purports to be a summary of the 1963 Rules is set forth in Exhibit I to the Affidavit of J. A. Robertson, Secretary of P.M.A. dated March 15, 1965. (R. 91v.)

By reason of the deregistrations, plaintiffs were no longer dispatched for employment from the dispatch hall operated jointly by defendants and were no longer eligible to work as longshoremen on the Pacific Coast.

On April 14, 1964, plaintiffs filed the herein action against the defendants. The original complaint was dismissed by the District Court for failure to adhere to the pleading requirements of Rule 8 (Fed. R. Civ. P.). Thereafter, the First Amended Complaint and the Second Amended Complaint were also dismissed for the same shortcomings. A Third Amended Complaint was filed alleging simply that the defendants had conspired to deprive plaintiffs of their right to work. (R. 7-12.) While the Third Amended Complaint was before the District Court, the plaintiffs who are now before this Court obtained present counsel and served and filed a Fourth Amended Complaint. The Fourth Amended Complaint was the only pleading prepared by present counsel.

On June 21, 1965, defendants moved to dismiss the Third Amended Complaint, the motions being directed to the three plaintiffs who chose to remain with the attorney who initially represented all of the plaintiffs. The Third Amended Complaint was dismissed without leave to amend* on the following grounds (R. 181-182):

> "It Appearing To This Court that it has no jurisdiction over the causes of action pleaded in the Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-La Guar-

*An appeal from the order of dismissal is now pending in this Court, Docket No. 20301.

dia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so, and

"It Further Appearing that the plaintiffs represented by Mr. Gordon have filed three prior complaints, each of which has been dismissed, that the acts complained of do not involve a breach of the collective bargaining contract but, if anything involve unfair labor practices, and that the plaintiffs represented by Mr. Gordon* have shown no possible basis under which they might be able to plead a cause of action within this Court's jurisdiction.

"It Is Hereby Ordered that the proposed injunction be and is hereby denied, and that the Third Amended Complaint be and is hereby dismissed without leave to amend."

B. The Allegations of the Fourth Amended Complaint

The Fourth Amended Complaint (R. 107-129) sets forth five causes of action. The first two counts are based upon the breach by the union defendants of their duty to give "fair representation" to all members of the bargaining unit, to act in good faith and without hostile or invidious discrimination based upon irrelevant and invidious distinctions. Defendant P.M.A. is charged with cooperating with the union defendants and accepting the benefits of this discrimi-

*Plaintiffs' former attorney.

natory treatment. This breach of a duty imposed upon a statutory bargaining agent was first recognized by the Supreme Court in *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944), and has been followed by a long line of cases arising under both the Railway Labor Act and the Labor Management Relations Act (to be discussed *infra*). It is the contention of plaintiffs that the *Steele* line of cases clearly establish the jurisdiction of the District Court to adjudicate the first two counts. 28 U.S.C.A. § 1337.

The first count alleges that as of June 17, 1963 all plaintiffs had earned their livelihood and been regularly employed as longshoremen for approximately 4 years (paragraphs 17-18); were registered as Class B longshoremen, were in good standing, were guilty of no current infractions and had corrected all past violations of rules (paragraph 19); were notified of their immediate and summary deregistration by defendants at the same time that defendants decided to promote 400 (other) Class B longshoremen to the Class A category (paragraph 20); that the decision to deregister plaintiffs and promote others was purportedly made pursuant to a new set of rules jointly adopted by defendants a few weeks prior to plaintiffs' notification of defendants' decision to deregister them (the "1963 Rules"); that plaintiffs were at no time notified or otherwise informed that changes in the rules were being considered or being contemplated, plaintiffs were not given an opportunity to present their point of view at any time up to the adoption of the new rules, and plaintiffs were never given

notice of the new rules until they were informed of the decision to deregister them (paragraph 21). The first count further alleges that the new rules were arbitrary and not reasonably relevant to the determination as to which Class B longshoremen should be promoted to the Class A category (paragraph 22); and were wholly irrelevant and capricious in determining who should be deregistered (paragraph 23); that the determination to promote some Class B longshoremen and deregister others was based on a retroactive application of alleged violations which served to penalize conduct which was not grounds either for denying promotion or for deregistration at the time the alleged acts were committed, but were grounds for only a nominal monetary fine; that the penalties imposed by defendants were contrary to the rules which existed at the time of the alleged acts (paragraph 23); and but for the conduct of defendants, each of the plaintiffs would have been a fully registered Class A longshoreman and member of Local No. 10 from on or about June 17, 1963 (paragraph 28).

The second count alleges that the 1963 rules governing promotion and deregistration were not applied equally and fairly against plaintiffs but were applied arbitrarily and with hostile discrimination in that other Class B longshoremen who had failed to meet the new standards were not deregistered but were promoted to Class A (paragraph 38); that the union defendants failed to fairly represent plaintiffs by agreeing to the unequal application of the new rules

and causing or agreeing to the deregistration and denial of promotion of plaintiffs (paragraph 39); and that defendant P.M.A. participated in the denial of plaintiffs' rights to fair representation in the administration of the collective agreement by joining in the unfair and unequal application of the new rules by the union defendants (paragraph 40).

The third count alleges that defendants breached the terms of the collective bargaining agreement by not advancing plaintiffs to Class A and by deregistering them from the "B" list. Plaintiffs contend that the Court's jurisdiction to hear this cause of action for breach of that collective bargaining agreement is provided by § 301 of the Labor Management Relations Act (29 U.S.C.A. § 185) as interpreted by the Supreme Court in *Smith v. Evening News,* 371 U.S. 195 (1962).

The fourth and fifth counts charge the individual defendants with conspiring to cause the employer and union defendants to pursue the hereinabove described wrongful conduct and pray for punitive damages. Plaintiffs contend that there is pendent federal jurisdiction to hear these counts which sound in tort under California State law.

1. The Affidavit of Plaintiff Stanley L. Weir

Plaintiffs submitted an affidavit of plaintiff Stanley L. Weir with numerous exhibits, wherein the events giving rise to the Fourth Amended Complaint were set out in detail (affidavit, R. 289-345, exhibits, R. 190-

278). This affidavit, submitted in opposition to the defendants' motions to dismiss, is reproduced in the appendix to this brief, and we invite the Court's attention thereto.

The Weir affidavit related the events leading up to the deregistrations of June 17, 1963. Approximately one week prior to February 26, 1963, the Class B longshoremen received letters on the stationery of Local No. 10 notifying them that the local was conducting an investigation of their eligibility for membership in the union, and that their presence was required before the union investigating committee on February 26, 1963 at the union office (R. 291-292). (It is alleged in paragraph 15 of the complaint that only Class A longshoremen were entitled to become members of Local No. 10.) Plaintiff Weir appeared at this meeting and the affidavit sets forth the names of the union personnel who were present. (R. 293.) Mr. Weir was told that his record was clear for union membership but a short time later was told that his record was not in fact clear because of "low-man-out" violations the preceding year ("low-man-out" is the means used to determine the order of dispatch, i.e., the longshoremen with the lowest number of hours worked will be the first to be dispatched to a job); after protesting, Mr. Weir was informed by the chairman of the committee that the procedural rules of the committee were changed as of that evening and there would be no opportunity to defend one's self before the committee; and it would be necessary to go to the record checker's office (located at the dispatching hall operated

jointly by the defendants) the following morning to do so (R. 293-294).

The following morning at the record checker's office, union officials called in one of their associates who had been "specially" handling Mr. Weir's case; after two accusations of dropping hours, i.e., reporting a lower number of hours worked so as to obtain an earlier dispatch, Mr. Weir showed the union officials, to their satisfaction, that he was in fact guilty of no such violations. He was then informed that he could appear at another meeting of the Investigating Committee (R. 295-296).

Mr. Weir, however, was not permitted to appear before the Investigating Committee on March 4, 1963, after arriving as directed (R. 296).

On March 8, 1963, he wrote a letter to the President of Local No. 10, requesting an opportunity to clear himself of any alleged violations, after noting that International President Harry Bridges had made it clear at a meeting of Local No. 10 that the local's Investigating Committee had rejected the men it considered "chisellers, dues delinquents, and contract violators" (R. 297). This letter was never answered (R. 298).

On May 14, 1963, Mr. Weir sent telegrams to the union and employer co-chairmen of the Joint Port "B" Relations Committee, which was then in charge of the matter, requesting to be notified, confronted and tried for any charges against him. There was no response to these telegrams (R. 298-299). On June 10,

1963, Mr. Weir sent letters to the Secretary and Chairman of the Joint Port Labor Relations Committee, representatives of the employer and union respectively, and a carbon copy to International President Harry Bridges, summarizing his frustrating experiences in attempting to clear up whatever charges might be pending against him and requesting union membership and A registration (R. 299-302). A copy of this letter was mailed the following day to Mr. Paul St. Sure, President of P.M.A. Neither this letter nor its copies were answered by defendants (R. 302).

What may euphemistically be called the first response of defendants to the inquiries of Mr. Weir was a form letter from the Longshore Labor Relations Committee of San Francisco, dated July 17, 1963, notifying him of his deregistration "for cause as a Class B longshoreman, pursuant to the provisions of #9 of the Memorandum of Rules concerning Registration and De-Registration of longshoremen in the Port of San Francisco. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules." (R. 302-303.) We direct the Court's attention to Section 9 of the 1958 Rules (Exhibit A to Fourth Amended Complaint, R. 126-129) where it is stated that a notice of deregistration is to be by letter in substantially the following form:

> "You are hereby notified that on the day of ....., 19....., at a regular meeting of the Joint Labor Relations Committee, by unanimous vote, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of Section

> 9 of the Memorandum of Rules Concerning Registration and De-registration of longshoremen in the Port of San Francisco. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules, and *particularly that you have (here give particulars).*" (Emphasis added.)

We note that the form letter notification of deregistration did not state that the action taken was by unanimous vote and is totally void of any particulars of the alleged violations, as required by Section 9. The notice of deregistration further stated:

> "In the event that the Joint Labor Relations Committee receives within (15) days after the date of this letter, a detailed written statement signed by you, *satisfactorily demonstrating that there is no ground for your de-registration,* and requesting a hearing, at which you may show cause, if any you have, why such de-registration should be rescinded" (R. 303). (Emphasis added.)

We are at a complete loss to understand how a deregistered longshoreman may reasonably be expected to provide a detailed written statement "satisfactorily demonstrating that there are no grounds for his deregistration", when he has never been provided with the specific reasons for his deregistration! Yet this was the procedure followed by the union defendants (with the active participation of the employers), while acting on behalf of plaintiffs as their bargaining representatives in administering the collective bargaining agreement.

On June 21, 1963, Mr. Weir wrote to the Joint Port Labor Relations Committee, hereinafter referred to as ("Port Committee") pointing out that the notice of deregistration did not inform him of the offenses he allegedly committed, as required by Section 9. He further requested a hearing and a written, detailed list of charges to enable him to prepare for the hearing (R. 310-311). The Port Committee responded by letter dated August 5, 1963, advising the date of the hearing but no statement of charges. Mr. Weir then sent a telegram to the Port Committee on August 7, 1963, once again requesting to be informed of charges against him. The Secretary of the Port Committee (an employer representative) replied by advising, "Your union is your exclusive bargaining representative" (R. 312). Mr. Weir did as instructed by sending a telegram on July 9, 1963, to the President of Local No. 10 requesting a statement of charges in order to prepare his defense. He received no response (R. 312-313).

On July 11, 1963, Mr. Weir appeared before the Port Committee. As the session opened, he was told:

(i) He would not be permitted to have counsel;

(ii) He would not be permitted to produce witnesses on his own behalf;

(iii) He would not be told the exact nature of the cause of deregistration, but only the general nature of the violation;

(iv) If he wanted to ascertain the exact nature of the charges, it would be necessary for him

to appear entirely unaccompanied at the records office of the Port Committee in one week (R. 312).

At the "hearing" before the Port Committee, the union representatives made no offer to represent him or to urge the Port Committee to be specific about the reasons for the deregistrations, or to be of any assistance whatsoever. The union representatives, exclusive bargaining representatives of plaintiffs, were the prosecutors, rather than the defendants of Mr. Weir (R. 313). Although not permitted to have counsel, two P.M.A. attorneys were present and provided counsel to the Secretary of the Port Committee (R. 318).

Mr. Weir stated to the Port Committee that his only possible violation as uncovered by the record checker hired by the union was for two-and-one-half hours of low-man-out (below the permissible limits under the 1963 Rules) which he denied. The President of Local No. 10 interrupted to read the report on Mr. Weir and confirmed his statements (R. 315). At the conclusion of his appearance before the Port Committee, one of the employer's representatives, Mr. Holtgrave, said "Are you claiming discrimination by this Committee? Because if you are, the rules say that you can take an appeal within ten days from today. Do you want to do that?" (R. 315). Mr. Weir responded, "How can I appeal within ten days from today from a decision which you tell me you will not reach for another two weeks?" Mr. Holtgrave did not reply (R. 316). It should be noted that at no time during the course of this "hearing" did the Port

Committee specify the nature of the alleged violations justifying deregistration.

On July 17, 1963, Mr. Weir again appeared at the record checker's office and was accused of 22½ hours of low-man-out violations on specific dates. He brought along his own records (each longshoreman carries his individual time book) which contradicted the records of the Port Committee. The officials of the Port Committee refused to look at Mr. Weir's records and refused to produce the sign-in sheets (the daily records from which the formal, detailed records are taken) for his inspection (R. 316).

On July 18, 1963, Mr. Weir wrote to the Secretary and Chairman of the Port Committee requesting a hearing to determine the validity of these now disclosed charges. He also protested the fact that the records of men who were registered (in Class A) were checked for only a four-week period while his records were checked for at least sixteen weeks (R. 317-318). On July 23, 1963, the Port Committee reaffirmed the deregistration, without specifying the reason for its decision (R. 319). On July 27, 1965, Mr. Weir wrote a letter to the Port Committee appealing his deregistration (R. 319-320).

Pursuant to Section 17.261 of the collective bargaining agreement, the appeal (if the decision of the Port Committee to deregister plaintiffs is in fact appealable) should have been referred immediately to the Joint Coast Labor Relations Committee, the next step in the grievance procedure. During the eight-and-

three quarter months following the filing of the appeal, Mr. Weir tried to ascertain if and when the committee and the defendants intended to act on the appeals of the deregistered men and was informed on the telephone that the matter was closed, that the decision of July 23, 1963 was final (R. 32). After waiting eight-and-three-quarter months, plaintiffs commenced this action on April 14, 1964. In December, 1964, the Coast Labor Relations Committee affirmed the deregistrations.

At this point, the Court has no doubt observed that only one of the fifty-one plaintiffs in this case submitted an affidavit to the District Court to controvert the affidavits submitted by defendants setting forth defendants' version of the deregistration. We note, however, that the procedure followed by defendants was uniform as to all alleged violators of the alleged 1963 Rules, the only difference being the specific violations alleged to have been committed by each plaintiff. We direct the Court's attention to the Reporter's Transcript of Proceedings of August 16, 1965, pp. 37-38, the oral argument in the District Court on the motions to dismiss. At that time, plaintiffs' counsel made an offer of proof wherein he offered to supply evidence that the kind of discrimination that was shown against Mr. Weir, the unfair representation, could be shown against practically every one of the plaintiffs, if not all of them. Such an oral offer of proof by counsel in summary proceedings has been recognized by this Court in determining the existence of facts indicating hostile discrimination or bad faith

by a collective bargaining representative in collusion with an employer. *Hardcastle v. Western Greyhound Lines,* 303 F.2d 182, 186-87, fn. 8 (9th Cir. 1962). The Court did not imply that making such assertions in an offer of proof would in and of itself have been sufficient to warrant a denial of summary judgment. Unlike the cited case, the plaintiffs in the case at bench made their offer of proof to corroborate the detailed affidavit of plaintiff Weir. Under these circumstances, we submit that the District Court was required to consider the oral offer of proof with the Weir affidavit of plaintiff to determine if there was sufficient evidence to deny summary judgment.

The Weir affidavit also related the hostile environment concerning B men on the waterfront. The opposition of the B men was based upon the refusal of P.M.A. and the union to advance them to the A category, combined with the payment of $29,000.00 by the P.M.A. into a fund whose only beneficiaries would be the Class A longshoremen registered as of August 10, 1959 (R. 339-341).

In 1960, the union permitted the B men to elect three of these numbered as representatives to the union Executive Committee. After these representatives were elected (among them plaintiff Weir), they were permitted to attend few sessions of the Executive Board and met with hostility there. One union official told the B representatives that they were being watched continuously and that they would be deregistered at the first opportunity that presented itself. Shortly thereafter, two of the B representatives

were deregistered. Another official told plaintiff Weir, "If they don't get you one way, they will another". (R. 341-342). Mr. Weir was also advised in the office of the President of Local 10, that ". . . it wasn't smart . . ." of plaintiff Weir to distribute on the waterfront a magazine article critical of the P.M.A.-I.L.W.U. contract and exploitation of the B men thereunder (R. 342).

The unequal treatment of B men by the defendants as compared to the A men is illustrated by the Local No. 10 Longshore Bulletins which are discussed in the affidavit (R. 56-57) and submitted as Exhibits I-1 through I-5 (R. 273-278). These union documents show that no Class A longshoremen and union member was ever deregistered for violations of existing rules which were more serious than those committed by plaintiffs. We invite the Court's comparison of the work records of the A men, as set forth in the exhibits, and the purported work records of plaintiffs as reported by defendant P.M.A. (R. 91-P—91-S).

2. Exhibits Annexed to the Affidavit of Plaintiff Stanley L. Weir.

Numerous exhibits relevant to this proceeding were annexed to the Weir affidavit (R. 190-287). We shall discuss these exhibits only briefly to explain some of the relevant portions as they apply to the instant controversy. Because of the limitations imposed by 9th Cir. R. 18(e), we invite the Court's attention to the entire set of exhibits.

Exhibit A. (R. 191-194.) These are the low-man-out rules dated 5/27/59, Paragraph 17 thereof provides:

"Checks will be made each week and violators will receive the following penalties:

First offense—30 days off

Second offense—6 months off

Third offense—Cancellation of Registration." (R. 194).

We note there to be no provision in these rules (or any other set of rules or regulations submitted to the District Court) which would authorize the deregistration of any longshoreman for a first offense. As stated above, these rules were dated 5/27/59. The defendants did not submit an actual copy of any superseding rules to the District Court. We also note the complexity of all the rules governing dispatch which are set forth in that exhibit.

Exhibit C. (R. 197-213.) This is a decision of Donald Gibson, Referee for the California Unemployment Insurance Appeals Board, entitled, "In the Matter of James V. Carter, et al., Claimants, Pacific Mutual Association, Employer." This decision on claims by many of the plaintiffs for unemployment compensation following their deregistrations, was reached after considering nearly 1,700 pages of transcript, including several hundred pages of testimony by representatives of defendants (as related by plaintiff Weir, R. 322). The Referee's opinion discussed the low-man-out rules (Exhibit A to the Weir Affidavit), and it appears from this discussion that the low-man-out rules dated 5/27/59 were still in full force and effect at the time of the deregistration (R. 204-205). The Referee's opinion also set out what appears to be

a copy of minutes of a meeting of the Longshore Labor Relations Committee on July 16, 1963 (subsequent to the deregistrations of June 17, 1963) containing the following:

> "The union submitted the following relative to the registration and de-registration of Class B Longshoremen.
>
> 1. That all B men who are on appeal and who have not been promoted solely because of low-man-out violations shall be given *30 days off as per contract* and promoted to A registration." (R. 205) (Emphasis added.)

From this portion of the record, we may conclude that as of July 16, 1963, the union representatives on the Port Committee, acting pursuant to instructions of their membership, voiced the opinion of their union membership that the only penalty provided in the contract for violators of the low-man-out rules was a thirty day suspension from work. This would be in accord with paragraph 17 of the low-man-out rules dated 5/27/59.

The Referee's opinion goes on to report that the Port Committee meeting of July 16, 1963, was recessed until July 19, 1963 when the employers appeared with their attorney, R. Ernst (R. 205). The employers then stated their opposition to the union matters by referring to "procedures and rules governing registration and deregistration previously agreed to by the parties" (R. 206). Yet the union appeared to be oblivious to the existence of the previously agreed to "procedures and rules", for the minutes do not state

if they admitted or denied the existence of the procedures and rules referred to by the employers. We note that the employers did not refer to the date the alleged procedures and rules were enacted or attempt to define them, but merely stated that "[T]he parties long ago agreed as to what would be good cause for de-registration" (R. 206).

The Referee found that all plaintiffs (at least those concerned with that unemployment proceeding), although delinquent at times with their pro-rata payments for the cost of the hiring hall, were all current as of the date consideration was given to them for reclassification as Class A Longshoremen; that some errors in low-man-out were because of a rule adopted by the dispatcher in connection with Sunday work; and because of lack of knowledge and understanding of the rules and confusion in the minds of plaintiffs as to the proper hours to be used (R. 209). As for those plaintiffs charged with lack of availability for work, in each instance, the referee found that the penalty imposed had been served (R. 209).

We conclude our discussion of this exhibit by referring the Court to the observations of the Referee that ". . . it is inherently impossible to believe that the claimants herein (plaintiffs) could logically have been expected to anticipate that their acts would result in the loss of their employment . . . the claimants did not embark on a course of action which they knew or should have known would result in the loss of their employment. As a matter of fact, over the years a pattern of behavior was established which was

condoned and allowed by the employer, the union and the Joint Port Labor Relations Committee . . . again, emphasis must be placed upon the fact that violations in respect to the working rules or in respect to availability were considered at the time of occurrence and penalties were assessed. These penalties being satisfied, the individuals were continued as Class B Longshoremen and were dispatched to employment as it arose." (R. 210).

Following oral argument of the motions to dismiss, plaintiff's counsel forwarded to the District Court copies of portions of the transcripts of the hearings before the California Unemployment Insurance Appeals Board. Plaintiffs pointed out testimony by a P.M.A. official that the purported 1963 rules under which plaintiffs were deregistered, were not in written form, nor in a single set of minutes form (R. 459). "These matters were discussed orally" (R. 461). The P.M.A. official did not know if the oral discussion was ever reduced to writing (R. 461). The various documents submitted to the Court by defendants *did not contain a single purported copy* of the rules or standards which plaintiffs allegedly violated. We submit that the absence of an adequate explanation for this omission was reason in and of itself for denying the motions for summary judgment. If, as plaintiffs believe, these standards never in fact existed, the deregistrations of plaintiffs would constitute one of the most arbitrary abuses of power ever exercised by a statutory bargaining agent in collusion with the employer.

Exhibit F (R. 230-263) is a Decision of the Trial Examiner of the National Labor Relations Board in San Francisco. This decision, rendered May 4, 1965, concerned charges of unfair labor practices brought against defendants I.L.W.U. Local No. 10 and P.M.A. by five Class B longshoremen who were deregistered at the same time as plaintiffs. The charging parties in the N.L.R.B. proceeding alleged that their deregistrations by defendants, for late payment of their pro-rata share of the cost of operating the dispatch hall were in violation of Sections 8 (b) (1) (A) and 8 (a) (1) of the Labor Management Relations Act, 29 U.S.C.A. §§ 151 et seq. After a hearing where all parties were afforded a full opportunity to be heard, examine, and cross-examine witnesses, adduce evidence, file briefs and submit oral argument, the Trial Examiner made findings of fact and concluded that defendants had committed unfair labor practices. Reinstatement with back pay was recommended (R. 260-263). The Trial Examiner relied upon *Miranda Fuel Co., Inc.,* 140 N.L.R.B. 181, enforcement denied *sub nom. N.L.R.B. v. Miranda Fuel Co., Inc.,* 326 F.2d 172 (2d Cir. 1963), where the National Labor Relations Board applied the doctrine of *Steele v. Louisville & Nashville R. Co.,* 323 U.S. 192 (1944) to Board proceedings for unfair labor practices.

The Trial Examiner's Decision was reversed by the National Labor Relations Board, *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local No. 10 (Johnson Lee),* 155 N.L.R.B. No. 117 (1965). The Board decided that

the acts of defendants did not constitute unfair labor practices, although the opinion of the Board did not discuss the applicability of the *Miranda* case.

This exhibit was submitted to the District Court by the plaintiffs to show the discussion of the deregistration proceedings by a second, independent tribunal (the California Unemployment Insurance Appeals Board, Exhibits C and D, supra, was the other tribunal whose discussion of this evidence was submitted by plaintiff Weir). Both of these tribunals, after extensive evidentiary hearings, found in favor of the deregistered Class B longshoremen on the factual issues litigated therein. The significance of those factual findings differed in each case because of the policy of the specific legislation which was involved. But there is no escaping the obvious conclusion that the referee's decisions in the unemployment compensation proceedings (Exhibits C and D) and the Trial Examiner's Decision (Exhibit F) corroborate, to a large extent, the statements contained in the Weir affidavit and plaintiffs' offer of proof. The corroboration supplied by the Trial Examiner's Decision was that particulars of the cause for deregistration were not provided and the deregistered men had not been informed of the 1963 deregistration standards at any time prior to their deregistration, or of any proposed ground for the action taken against them (R. 237); the Port Committee had not informed any of the men of the "cause" of deregistration at any time prior to the hearing, nor did Local No. 10 take the initiative to inform them of the basis for the deregistration (R.

239). The P.M.A. representative on the Port Committee who testified before the Trial Examiner was "notably lacking in detail" as to the reasons provided to the deregistered men (R. 240). Probable error in the records of the Port Committee (R. 242) was noted as was the failure of the notice of July 23, 1963, reaffirming the deregistrations to provide a specific reason for the deregistrations (R. 242), and the different treatment afforded to Class A longshoremen by Local No. 10 for the late payment of pro rata from that afforded to Class B, different treatment not depending upon any relevant or reasonable distinction (R. 246-247). The Trial Examiner observed that while Class B men were deregistered for late payments ranging from $62 to $80, there were about a dozen members of Local No. 10 (all Class A) each of whom owed substantially more of their pro-rata shares, some owing hundreds of dollars and one, listed as in "jail" being indebted for $1,014 (R. 245-246); "There is no claim by Respondents that any Local 10 member or Class A registrant had ever been deregistered by the Port Committee for . . . pro rata shares." (R. 246, fn. 26).

The N.L.R.B. proceedings are germane here because the defendants urged the proposition on the court below that the plaintiffs' remedy, if any, was to file unfair labor practice charges with the Board. On May 17, 1965, in the interim between the Trial Examiner's Decision and the reversal thereof by the N.L.R.B., most of the plaintiffs in this action filed unfair labor practice charges against defendants. (R. 128, 129). On June 21, 1965, the Acting Regional Di-

rector of the Board in San Francisco refused to issue a complaint by reason of the expiration of the six-month statute of limitations under Section 10(b) of the Act (R. 180 B). The decision of the Acting Regional Director to issue a complaint was affirmed by the General Counsel of the Board in Washington, D.C. on September 24, 1965 (R. 499).

In view of the N.L.R.B. case of *Johnson Lee,* supra, it is doubtful if the conduct herein alleged comes within the definition of an unfair labor practice.

C. The Motions to Dismiss the Fourth Amended Complaint Were Motions for Summary Judgment

On August 16, 1965, the defendants moved to dismiss the Fourth Amended Complaint. The motions to dismiss were based to a large extent upon affidavits with exhibits attached submitted by defendants. In opposition, plaintiffs submitted the affidavit of Plaintiff Stanley L. Weir, also accompanied by exhibits.

Under Rule 12, if matters outside the pleading are presented to and not excluded by the Court on a motion asserting a defense of failure to state a claim upon which relief can be granted (as here), the motion is to be treated as one for summary judgment and disposed of as provided in Rule 56. *International Longshoremen's and Warehousemen's U. v. Kuntz,* 334 F.2d 165, 168 (9th Cir. 1964). Under Rule 56, judgment for the moving party is to be rendered forthwith if the pleadings and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

matter of law. Plaintiffs contend that the affidavits and documents submitted by the parties show there to be genuine issues as to numerous material facts concerning the reasons for plaintiffs' deregistrations.

D. The Order Dismissing the Fourth Amended Complaint

On August 16, 1965, oral argument was held on the defendants' motions to dismiss the Fourth Amended Complaint. After taking the matter under submission, the District Court, on October 8, dismissed this complaint. The order reads, in pertinent parts, as follows (R. 500-02):

> "In a formal order filed on July 20, 1965, this court stated the grounds for dismissing the Third Amended Complaint as follows: It appears to this court 'that it has no jurisdiction over the causes of action pleaded in the Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-LaGuardia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so . . .'
>
> "Notwithstanding that the Fourth Amended Complaint is more artfully drafted than its predecessors, and notwithstanding that the language and phraseology of the Fourth Amended Complaint are directly inspired by the most recent

Supreme Court decisions on the subject of § 301 suits, it appears to this court that the underlying events which give rise to the allegations in the complaint, and the basic issues to which these allegations give rise, are identical to, and not different from, the events, allegations and issues involved in the Third Amended Complaint.

"Accordingly, It is Hereby Ordered that the Fourth Amended Complaint be, and the same hereby is, DISMISSED without leave to amend."

III

SPECIFICATION OF ERROR

Plaintiffs contend that it was error for the District Court to dismiss the Fourth Amended Complaint, in that the complaint set forth claims upon which relief could be granted because:

A. Hostile discrimination was alleged;

B. Breach of contract was alleged;

C. Injunctive relief is proper in this type of case;

D. Plaintiffs were not required by the collective bargaining agreement to present their claims to the arbitrator;

E. There was no expiration of any applicable "statute of limitations" barring relief;

F. The District Court had jurisdiction over the individual defendants by reason of pendent federal jurisdiction.

G. There were genuine issues over material facts raised by the affidavits.

IV

ARGUMENT

A. THE "HOSTILE DISCRIMINATION" CASES AND INJUNCTIVE RELIEF.

The allegations in the first two counts and the relief sought by the plaintiffs are similar to those of the petitioners in *Steele v. Louisville & Nashville R. R. Co.*, 323 U.S. 192 (1944). *Steele* was the first in a long line of decisions clearly providing that individual members of a bargaining unit have a cause of action against their exclusive statutory bargaining agent for breach of the latter's duty to represent all members of the bargaining unit fairly and without invidious and hostile discrimination. Because of the impact of *Steele* on subsequent decisions and its bearing here, we cite at length from the opinion.

Steele concerned an action in a state court brought by Negro firemen employed by the defendant railroad. The defendant Brotherhood of Locomotive Firemen and Enginemen, a labor organization, was the exclusive bargaining representative of the craft of firemen employed by the railroad as provided under § 2, Fourth, of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* The majority of the firemen employed by the railroad were white and were members of the Brotherhood, while a substantial minority were Negroes who were excluded from membership.

The plaintiffs alleged that the Brotherhood, purporting to act as the representative of the entire craft of firemen, without informing the plaintiffs or giving them opportunity to be heard, served notice upon the

employer of its desire to amend the existing collective bargaining agreement in such a manner as to ultimately exclude all Negro firemen from service. New agreements were entered into between the Brotherhood and the employer limiting the plaintiffs' employment opportunities and controlling their seniority rights. The Negro firemen were not given notice or opportunity to be heard with respect to either of these agreements which were put into effect before their existence was disclosed to them. *Id.* at 194-196.

White men junior in seniority were placed in jobs highly desirable in point of wages, hours and other conditions, while the plaintiffs were deprived of employment for sixteen days and then assigned to more arduous, longer and less remunerative work in local freight service. *Id.* at 196.

These allegations from *Steele* are closely analogous to those in the instant litigation and, with respect to the last, it is to be recalled that paragraph 21 of the instant complaint alleges:

> "21. That the aforesaid decision was purportedly made pursuant to an alleged new set of rules adopted by the defendants jointly a few weeks prior to the summary notification of the plaintiffs of the defendants' decision to deregister them; that the plaintiffs were at no time notified or otherwise informed that changes in the rules were being considered; that the plaintiffs were at no time notified or otherwise informed that the adoption of new rules was being contemplated; that the plaintiffs were never given an opportunity to present their point of view, position or interest during or preceding the nego-

> tiations leading up to or at the time of the adoption of the new rules; that the plaintiffs were never informed when the new rules were adopted; that the plaintiffs were never given notice of the new rules or a copy thereof prior to being informed of the decision to deregister them."

Chief Justice Stone, speaking for the Court, emphasized that when Congress enacted the Railway Labor Act and authorized a labor union, chosen by a majority of a craft, to represent the craft, it did not intend to confer plenary power upon the union to sacrifice the rights of the minority of the craft for the benefit of its members without imposing on it any duty to protect the minority. The Court pointed out that since the plaintiffs were neither members of the Brotherhood nor eligible for membership, the authority of the union to act for them was derived not from their action or consent, but wholly from the command of the (Railway Labor) Act. *Id.* at 199.

> "The purpose of providing for a representative is to secure those benefits for those who are represented and not to deprive them or any of them of the benefits of collective bargaining for the advantage of the representative or those members of the craft who selected it." *Id.* at 201.
>
> "Once a craft or class has designated its representative, such representative is responsible under the law to act for all employees within the craft or class, those who are not members of the represented organization, as well as those who are members." *Id.* at 201.
>
> "Unless the labor union representing a craft owes some duty to represent non-union members

of the craft, *at least to the extent of not discriminating against them as such in the contracts which it makes as their representative,* the minority would be left with no means of protecting their interests or, indeed, their right to earn a livelihood by pursuing the occupation in which they are employed. . . . The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and *it is to act for and not against those whom it represents.* It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for who it is exercised unless so expressed." *Id.* at 201-202. (Emphasis added.)

The opinion then continues and in language which has often been repeated, but which warrants repetition again, said:

"We think the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. J. I. Case Co. v. National Labor Relations Board, supra, 321 U.S. 335, 64 S. Ct. 579, but it has also imposed on the representative

> a corresponding duty. We hold that the language of the Act to which we have referred, . . . read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts without hostile discrimination against them." (323 U.S. at 202-203.)

Mr. Chief Justice Stone observed that the duty of fair representation as defined above with its emphasis on the affirmative constitutional duty of the exclusive bargaining representative to protect the rights of the minority did not prevent the union from making decisions in good faith which were based on relevant differences, but that "the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discrimination not based on such relevant differences." (323 U.S. at 203.) The bargaining representative, he further observed, was not authorized to make distinctions based upon "irrelevant and invidious" considerations. Moreover, said Mr. Justice Stone in dealing with the matter which lies at the very core of the instant litigation, that:

> "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the

> right to determine eligibility to its membership, *it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith. Wherever necessary to that end, the union is required to consider requests of non-union members of the craft and expressions of their views with respect to collective bargaining with the employer and to give to them notice of and opportunity for hearing upon its proposed action.*" *Id.* at 204. (Emphasis added.)

There are two final aspects to the *Steele* case which are important with respect to the instant litigation.

The *Steele* complaint prayed for the following relief: an injunction against enforcement of the agreements made between the Railroad and the Brotherhood; for an injunction against the Brotherhood and its agents from purporting to act as representatives of the plaintiffs and others similarly situated under the Railway Labor Act, so long as the discrimination continued and so long as it refused to give the plaintiffs notice and hearing with respect to proposals affecting their interests; for a declaratory judgment as to their rights; and for an award of damages against the Brotherhood for its wrongful conduct. 323 U.S. at 197. The defendants argued that the plaintiff had a duty to take his complaint to the Adjustment Board. The United States Supreme Court held the argument to be without merit saying "that Board *could not give the entire relief here sought*" and that,

therefore, it could not "say that a hearing, if available, before either of these tribunals would constitute an *adequate* administrative remedy."

Furthermore, said the Supreme Court, in the absence of any available administrative remedy—that is an adequate remedy, a remedy that would give the entire relief sought, a remedy which would not mutilate the comprehensive relief of equity—"the right here asserted, to a remedy for breach of the statutory duty of the bargaining representative to represent and act for the members of a craft, is of judicial cognizance. That right would be sacrificed or obliterated if it were without the remedy which courts can give for breach of such a duty or obligation and which it is their duty to give in cases in which they have jurisdiction." Moreover, the Supreme Court added that it could not "say . . . that resort to such proceedings in order to secure a possible administrative remedy . . . is prerequisite to relief in equity."

The Supreme Court concluded that the breach of duty complained of in the *Steele* case "contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for the breach of that duty." In this connection it is apposite to observe that the Supreme Court at pages 203-204 had held:

> "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is pro-

> hibited by the statute from making. In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of their condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted.' Deitrick v. Greaney, 309 U.S. 190, 200, 201, 60 S.Ct. 480, 485, 84 L. Ed. 694 . . .". 323 U.S. at 203-204.

The possible distinctions between *Steele* and the case at bench have been obviated by subsequent decisions. *Steele* arose in a state Court, but its companion case, *Tunstall v. Brotherhood,* 323 U.S. 210 (1944) held that similar claims could be considered by the Federal District Courts by reason of jurisdiction conferred by 28 U.S.C.A. § 41(8) (now 28 U.S.C.A. § 1337) as a case arising under a federal law regulating commerce. 323 U.S. at 213. The *Steele* case made judicially cognizable unfair representation in the negotiation and execution of collective agreements. The *Tunstall* case carried the logic one step further. It made unfair representation in the administration of a collective agreement judicially cognizable and, like the *Steele* case, provided that the remedy be both injunctive and monetary.

Decided simultaneously with *Steele* and *Tunstall* was *Wallace Corporation v. National Labor Relations*

Board, 323 U.S. 248, wherein the concepts of unfair representation were applied to the National Labor Relations Act:

> "The duties of a bargaining agent selected under the terms of the Act extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation." 323 U.S. 255-256.

In *American Communications Associations v. Douds,* 339 U.S. 382 (1950), the Supreme Court relying on the *Steele, Tunstall* and other similar cases, said:

> "Under the statutory scheme, unions which become collective bargaining representatives for groups of employees often represent not only members of the union but non-union workers or members of other unions as well. Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them. See J. I. Case Co. v. National Labor Relations Board, 1944, 321 U.S. 322, 64 S.Ct. 576, 88 L.Ed. 762. The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group —the union. *But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exer-*

> *cise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself."* 339 U.S. at 401-402. (Emphasis added.)

Subsequently, in 1952 the Supreme Court had before it a case involving a factual pattern considerably different from that in the *Steele* case, but it held that nevertheless the principles enunciated in the *Steele* case would govern: *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768.

In the *Howard* case the white brakemen were organized in a union which entered into an agreement with the railroad the ultimate effect of which would be to force the replacement of Negro "porters" who were actually doing the work of brakemen by white employees. The Negro "porters" were organized in a separate union of their own. The Supreme Court pointed out that it was argued by the defendant Brotherhood that it "owed no duty at all to refrain from using its statutory bargaining power so as to abolish the jobs of the colored porters and drive them from the railroads". The Supreme Court held the argument to be unsound and held that even though the Negro porters were organized in a separate union of their own there had, nevertheless, been a breach of duty by the defendant Brotherhood. In the course of its opinion the Supreme Court said:

> "Here, as in the Steele case, colored workers must look to a judicial remedy to prevent the sacrifice or obliteration of their rights under the Act. For no *adequate* administrative remedy can

be afforded by the National Railroad Adjustment or Mediation Board. . . . *This dispute involves the validity of the contract, not its meaning.* . . . Our conclusion is that the District Court has jurisdiction and power to issue necessary injunctive orders notwithstanding the provisions of the Norris-LaGuardia Act. We need add nothing to what was said about inapplicability of that Act in the Steele case and in Graham v. Brotherhood of Firemen, 338 U.S. 232, 239-240, 70 S.Ct. 14, 18, 94 L.Ed. 22.

"Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers. . . . On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from the use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs." (pp. 774-775.)

In *Conley v. Gibson,* 355 U.S. 41 (1957), the Supreme Court dealt with still another of the series of cases predicated on discrimination under the Railway Labor Act. In that case Negro employees, complaining that their collective bargaining representative refused and neglected to furnish them with fair representation, sought a declaratory judgment, an injunction and damages. The Supreme Court summarized their complaint as follows:

"A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May, 1954, the Railroad

purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees. The complaint then went on to allege that the Union had failed in general to represent Negro employees equally and in good faith. It charged that such discrimination constituted a violation of petitioners' right under the Railway Labor Act to fair representation from their bargaining agent."

The Supreme Court after pointing out that the *Conley* case was another in the series beginning with *Steele v. Louisville & Nashville R. Co.,* in which it had "emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and has held that the Courts have power to protect employees against such invidious discrimination," went on to write:

"The respondents point to the fact that under the Railway Labor Act aggrieved employees can file their own grievances with the Adjustment Board or sue the employer for breach of contract. Granting this, it still furnishes no sanction for the Union's alleged discrimination in refusing to

represent petitioners. The Railway Labor Act in an attempt to aid collective action by employees, conferred great power and protection on the bargaining agent chosen by a majority of them. As individuals or small groups the employees cannot begin to possess the bargaining power of their representatives in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain in their behalf. We need not pass on the Union's claim that it was obliged to handle any grievances at all because we are clear that once it undertook to bargain or present grievances for some of the employees it represented it could not refuse to take similar action in good faith for other employees just because they were Negroes."

In *Gainey v. Brotherhood of Railway and Steamship Clerks,* 313 F. 2d 318, 322-323 (3rd Cir. 1963), *cert. denied,* 363 U.S. 811, the Court discussed the *Steele* rule in detail:

"The *Steele* rule is that a union which possesses the power to act for all employees of a bargaining unit has the corresponding duty to represent all the members of the unit fairly, impartially, and in good faith, without 'hostile discrimination' against any of them. Although originally employed in racial discrimination problems arising under the Railway Labor Act, the protection afforded by this doctrine has since been extended to encompass all forms of hostile discrimination. See *Ford Motor Company v. Huffman,* 345 U.S. 330 (1952); *Mount v. Grand International Brotherhood of Locomotive Engineers,* 226 F. 2d 604 (6 Cir. 1955), *cert. denied,* 350 U.S. 697;

Cunningham v. Erie R.R., 266 F. 2d 411 (2 Cir. 1959); *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9 Cir. 1962).

"In order to come within its ambit, the complaint before us must have more than conclusory statements alleging discrimination. In particular, plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination', an allegation that certain conduct of the brotherhood or a condition permitted to exist by it is 'invidious' and 'discriminatory' without a concomitant identification of lack of good faith, will not set forth a claim sufficient to call for the use of the *Steele* doctrine. *Hardcastle v. Western Greyhound Lines, supra* at 185-86; *Colbert v. Brotherhood of Railway Trainmen,* 206 F. 2d 9, 12 (9 Cir. 1953)."

The Third Circuit upheld the dismissal of the complaint because of the failure of the plaintiffs to allege that there was not a good faith effort on the part of the Brotherhood to alleviate the disparity in wage rates, and that the allegations of the Brotherhood's bad faith, hostile discrimination, were at most illusory. 313 F. 2d at 323.

The Court in *Gainey,* further summarized the three broad categories of cases applying the *Steele* doctrine, 313 F. 2d at 324:

"(1) racial discrimination dealing with a patent disregard and sacrifice of job opportunities and seniority rights of Negro employees for the sole purpose of benefiting white employees; e.g., *Steele*

v. Louisville and N. R.R. Co., supra; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); *Conley v. Gibson, supra*;

(2) involving the arbitrary sacrifice of a group of employees' rights in favor of another stronger or more politically favored group, often in direct violation of established union practice, e.g., *Ferro v. Railway Express Agency, Inc.,* 296 F. 2d 847 (2 Cir. 1961); *Mount v. Grand International Brotherhood of Locomotive Engineers, supra; Hargrove v. Brotherhood of Locomotive Engineers,* 116 F. Supp. 3 (D.D.C. 1953); and

(3) discriminatory measures taken against an individual which sacrificed his rights for hostile and improper reasons, e.g., *Cunningham v. Erie R. R. supra; Brody v. Trans World Airlines, Inc.,* 174 F. Supp. 360 (D. Del. 1959); see also *Bohannon v. Reading Company,* 168 F. Supp. 662 (E.D. Pa. 1958). The common thread running throughout these opinions is the improper, usually bad faith, motivation for the course taken. That essential element is not present in the complaint or its collateral papers. Plaintiffs have no cause of action without it."

The *Steele* rule is not limited to cases concerning racial discrimination. Although originally employed in racial discrimination problems arising under the Railway Labor Act, the protection afforded by this doctrine has since been extended to cover all forms of hostile discrimination. *Mount v. Grand International Brotherhood of Locomotive Engineers,* 226 F. 2d 604 (6th Cir. 1955), *cert. denied,* 350 U.S. 697; *Cunningham v. Erie R. R.,* 266 F. 2d 411 (2nd Cir.

1959); including industries covered by the Labor Management Relations Act. *Ford Motor Co. v. Huffman,* 345 U.S. 330, 337 (1953); *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9th Cir. 1962); *Rumbaugh v. Winifrede Railroad Company,* 331 F. 2d 530, 534 (4th Cir. 1964); *Syres v. Oilworkers International Union,* 350 U.S. 892, reversing 223 F. 2d 739; *Humphrey v. Moore,* 375 U.S. 335, 356-358 (1964) (see footnote 6 and concurring opinions of Justices Goldberg, Brennan, Douglas and Harlan).

In the *Syres* case the United States Supreme Court without even bothering to write an opinion but simply enumerating the *Steele* line of cases reversed a judgment for the defendant in the Circuit Court and ordered further proceedings in the trial Court where individual employees had brought an action against their exclusive bargaining agent and their employer, and in which they sought to enjoin the defendants and to declare void a collective bargaining agreement which violated the duty of fair representation. The Supreme Court did this in the face of strenuous objection to the effect that the employees should have brought their complaint before the National Labor Relations Board.

(1) Pleading "Hostile Discrimination".

In subsequent litigation between the parties in the *Gainey* case in the District Court, *Gainey v. Brotherhood of Railway and Steamship Clerks, etc.,* 230 F. Supp. 678 (E.D. Pa. 1964), the Court held that the plaintiffs properly stated a cause of action for "hos-

tile discrimination", with the following allegations with regard to hostility:

> "XV. The defendant union, contrary to the Railway Labor Act, is hostile toward the membership of the Philadelphia locals, where the bulk of the herein tallymen (plaintiffs) are located, because of the latter's opposition toward the General Chairman and the staff of the union's System Board and the International President and the staff of the Grand Lodge of the union." 230 F. Supp. at 682.

With regard to discrimination, the plaintiffs alleged that the railroad and union:

> ". . . acting individually and in concert by acts of omission and commission designed to discriminate against Eastern Region Talleymen so that their pay scales would be approximately twenty-five dollars a month less than talleymen employed in the Central Region of the carrier; and this discrimination was agreed upon as a means of punishing the plaintiffs and other members of the defendant union in the Eastern Region for their opposition to the Union leadership . . ." 230 F. Supp. at 682.

The Court held that the complaint contained a plain statement which gave the defendants a fair notice of the plaintiffs' claim and the grounds upon which it rested, that the defendants should answer and invoke discovery procedures. 230 F. Supp. at 682.

With regard to the requirements of pleading "hostile discrimination", see also *Conley v. Gibson,* 355 U.S. 41, 43, where the following allegations were held

to be sufficient; that the Local was the designated bargaining agent under the Railway Labor Act for the petitioner's bargaining unit; that a contract existed between the union and the Railroad which gave employees in the bargaining unit certain protection from discharge and loss of seniority; that the Railroad purported to abolish jobs held by petitioners or other Negroes, all of whom were either discharged or demoted; that these jobs were not abolished but were filled by whites; that the union, acting according to plan, did nothing to protect the petitioners against these discriminatory discharges, although it was requested to intervene on their behalf. The complaint then went on to allege that the union had failed in general to represent Negro employees equally and in good faith, and charged that such discrimination constituted a violation of petitioners' rights under the Railway Labor Act to fair representation from their bargaining agent. The complaint concluded by asking for relief in the nature of declaratory judgment, injunction and damages.

The aforementioned allegations were held by the Court in *Conley v. Gibson,* supra, to adequately set forth a claim upon which relief could be granted under the general principles laid down in the *Steele, Graham** and *Howard* cases. 355 U.S. at 45. The Court stated the general federal practice of appraising a complaint, i.e., that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can *prove* no set of

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**Graham v. Brotherhood of Locomotive Firemen,* 338 U.S. 232 (1949).

facts in support of his claim which would entitle him to relief. 355 U.S. at 45-46. The Court held that if the aforementioned allegations were proven, there had been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit. 355 U.S. at 46. The Court further held that

> "... collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face, yet administered in such a way, with the active or tacit consent of the Union, as to be flagrantly discriminatory against some members of the bargaining unit." 355 U.S. at 46.

The defendants in *Conley v. Gibson* argued, as did the defendants in the instant case, that the complaint failed to set forth specific facts to support its general allegations of discrimination. In answer to this contention, the Court cited Fed. R. Civ. Proc. 8(a)(2) and said:

> "To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified

> 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(b) that 'all pleadings shall be so construed as to do substantial justice', we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Cf. *Maty v. Grasselli Chemical Company,* 303 U.S. 197." 355 U.S. at 47-48.

We believe that the rules of pleading summarized in *Conley v. Gibson* are applicable to the case at bench, where defendants asserted in their motions that plaintiffs have not properly alleged "hostile discrimination". The complaint and the affidavit of plaintiff Stanley Weir certainly make a prima facie showing of "hostile discrimination" sufficient to bring this case within the *Steele* doctrine. In any event, the defendants could have moved for a "more definite statement" under Rule 12(e), if they believed the complaint to be vague or ambiguous, a procedure to which they resorted a number of times to the complaints filed by plaintiffs' former counsel.

> "In some instances, relief in the courts has been denied because charges of discrimination have either not been made or have clearly been

> unwarranted (citations), but where a good faith allegation of discrimination is made, specific facts in support of the general allegations need not be set forth and a court may not dismiss the suit for want of jurisdiction." *Haley v. Childers,* 314 F. 2d 610, 616 (8th Cir. 1963).

Chief Judge Sobeloff of the Fourth Circuit discussed the principles of pleading "hostile discrimination" in recent cases arising under the Railway Labor Act:

> "As this court recently had occasion to say, '(i)t is well established that, under both the Railway Labor Act and the National Labor Relations Act, 29 U.S.C.A. Section 151 et seq., a bargaining agent must fairly and without discrimination represent all employees in the bargaining unit, and that employees discriminatorily treated have recourse to the federal courts,' *Hostetler v. Brotherhood of Railroad Trainmen,* 287 F. 2d 457, 458 (4 Cir. 1961), *cert. denied,* 368 U.S. 955. Characterized as the duty of fair representation, the bargaining agent's obligation arises under the federal labor acts.
>
> "Professor Summers has observed: 'The source of the union's duty to the individual is . . . its statutory power to bargain and make binding agreements which in fact govern the individual's employment.'* Initially formulated in class actions involving racial discrimination in the negotiation of collective bargaining agree-

*Summers, "Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law," 72 Yale L.J. 421, 432 (1963).

ments, the duty of fair representation has been held to extend as well to the administration of collective bargaining agreements." *Thompson v. Brotherhood of Sleeping Car Porters,* 316 F. 2d 191, 197 (4 Cir. 1963).

". . . it appears necessary to pursue only one line of inquiry to resolve the questions of 'invidious discrimination'; 'reasonableness', 'good faith and honesty': Did the plaintiff show that he received different or substantially sub-standard representation at the hands of the Brotherhood? If so, was it because of some improper reason, such as his unsatisfactory union status? Did this treatment cause him injury? If the answers of the trier of fact to the three questions are in the affirmative, the plaintiff is entitled to relief." *Id.* at 200.

"While it is not always appropriate to transplant common law concepts to the field of labor relations, it is plain that in the Supreme Court's view the federal statutory duty of fair representation is not unlike a common law fiduciary obligation." *Id.* at 201.

See also:

Rumbaugh v. Winifrede Railroad Company, 331 F. 2d 530, 533 (4th Cir. 1964):

"Since the landmark case of *Steele v. Louisville and Nashville R. R.* (citation), the principle has become unchallengeable that the federal courts have subject matter jurisdiction to enforce the judicially-created duty imposed upon bargaining agents to represent all employees in the bargaining unit fairly and without racial discrimination."

(2) Ninth Circuit Cases

In the Ninth Circuit, three reported cases have discussed "hostile discrimination". *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9th Cir. 1962), *cert. denied,* 371 U.S. 920, was an action by a number of employees who sought declaratory relief and an injunction, alleging that they were unlawfully deprived of certain seniority rights. It was alleged that after a merger of a number of bus lines, seniority was changed from a division basis to a system basis, resulting in a loss of divisional seniority for plaintiffs. Plaintiffs asserted that the new agreement, retroactively affecting their seniority, "arbitrarily, unfairly and capriciously" deprived them of their seniority rights. Plaintiffs further alleged that they were "discriminated against" and that the action by defendants was "unreasonable". Unlike the case at bench, the plaintiffs in *Hardcastle* did not allege the invalidity of the new agreement concerning seniority.

This Court upheld the dismissal of the Complaint because of a failure to allege a bad faith motive, an intent to hostilely discriminate against a portion of the union's membership. 303 F. 2d at 185. We believe that the allegations set forth in the affidavit of plaintiff Weir make a prima facie showing of "bad faith" and an intent to hostilely discriminate against a portion of the "bargaining unit". If the union representatives on the Port Committee weighed the relative advantages and disadvantages of different proposals in good faith and concluded that the plaintiffs should not have been promoted to Class "A"

and should be deregistered from the "B" list, then such facts would be a defense, e.g., *Ford Motor Co. v. Huffman, supra,* 345 U.S. at 337-338, and should be determined after a trial on the merits, rather than in a summary proceeding.

We note that this Court determined that the plaintiffs in *Hardcastle*

> "have done nothing more than present facts showing dissatisfaction with a result adopted by a majority of the union of which the appellants are members. That portions of an electorate will be dissatisfied with the result of an election is a fact inherent in the democratic process and the principle of majority rule." *Id.* at 187.

In the instant case, plaintiffs have alleged more than "dissatisfaction with a result adopted by a majority of the union." The obvious distinction, of course, is that plaintiffs in the case at bench were not members of the union and had no control over union policies, a situation similar to that of the plaintiffs in *Steele.* In addition, the plaintiffs in this case, as those in *Steele,* had no opportunity to be heard concerning the adoption of the new rules under which they were deregistered, and throughout the grievance procedure they were not advised of the specific nature of the "cause" of their deregistrations (as required by the Rules) and given an opportunity to defend themselves. The complaining parties in *Hardcastle* presented no facts in their offer of proof to the trial Court from which the Court could infer bad faith or hostile discrimination. In fact, the parties entered

into a stipulation of facts showing there was a rational basis for the selection of the date of commencement of seniority. 303 F. 2d at 188. The allegations of the plaintiffs here and in the affidavit of plaintiff Weir are replete with charges of bad faith and hostile discrimination.

In *International Longshoremen's & Warehousemen's U. v. Kuntz,* 334 F. 2d 165 (9th Cir. 1964), this Court recognized that jurisdiction in the District Court vests under § 301 in circumstances where a bargaining representative has violated its duty of fair representation pursuant to a contract.

> "As the concurrence of Justice Goldberg served to emphasize [*Humphrey v. Moore,* 375 U.S. 335, 351-359], in certain circumstances actions for breach of a bargaining representative's duty of fair representation [see *Steele v. Louisville & Nashville Railroad Co.,* 323 U.S. 192 (1944)] may be laid under § 301 if a sufficient connection between the contract and breach of duty is shown. 375 U.S. at 343. Thus, for example, if the action complained of is taken pursuant to or implemented by the contract (as here) jurisdiction may vest under § 301." *Id.* at 168.

In the case at bench, the second count alleges the administration of the contract by defendants in such a manner as to violate the duty of the union defendants to fairly represent the plaintiffs, with the rationale of *Humphrey v. Moore, supra,* and *International Longshoremen's & Warehousemen's U. v. Kuntz, supra.* We believe that the allegations of the Fourth Amended Complaint, considered with the affi-

davit of plaintiff Weir, establish "a bad faith motive, an intent to hostility discriminate" on the part of defendants, *International Longshoremen's & Warehousemen's Union v. Kuntz, supra,* at 171.

In *Alexander v. Pacific Maritime Association,* 314 F. 2d 690 (9th Cir. 1963), this Court held the National Labor Relations Board had exclusive jurisdiction over allegations that the plaintiffs' union and employer discriminated against non-union members of the bargaining unit in favor of union members. The discrimination took the form of dispensing employment and employment benefits under the collective bargaining agreement. The *Alexander* case was decided after the Supreme Court decision of *Smith v. Evening News,* 371 U.S. 195 (1962), and this Court reversed so that the plaintiffs might amend their pleadings to allege breach of contract. *Id.* at 694-95. The *Alexander* case was decided prior to *Humphrey v. Moore, supra,* and therefore did not discuss the relationship between the hostile discrimination cases and the breach of contract cases. The subsequent Ninth Circuit holding in *International Longshoremen's & Warehousemen's U. v. Kuntz, supra* at 168, did discuss the *Humphrey v. Moore* case and reached a conclusion contrary to that of *Alexander.* We submit that the holding of *Alexander* concerning jurisdiction of the National Labor Relations Board is no longer valid in light of the subsequent decisions in *Humphrey v. Moore* and *ILWU v. Kuntz.*

B. THE BREACH OF CONTRACT CASES AND §301

> "The Supreme Court has all but sounded the death knell of the theory of exclusive NLRB jurisdiction in cases arising under section 301 of the Labor-Management Relations Act."

Carey v. General Electric Company, 315 F. 2d 499, 508 (2 Cir. 1963). See: *Smith v. Evening News Assn.,* 371 U.S. 195 (1962); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 245 n. 5 (1962); *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95, 101 n. 9 (1962); *Dowd Box Co. v. Courtney,* 368 U.S. 502, 513 (1962).

Prior to the Supreme Court's decision of *Smith v. Evening News Assn.,* 371 U.S. 195 (1962), certain activities arguably constituting unfair labor practices were held to be within the exclusive jurisdiction of the National Labor Relations Board. E.g. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). The *Garmon* type situation was one where state courts attempted to adjudicate controversies which "arguably" fell within the jurisdiction of the Board.

The *Garmon* rule was modified in *Local 174, Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962) and *Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962), where the Court held that state courts were not divested of jurisdiction over suits for violation of collective bargaining agreements by §301. The scope of §301 was further expanded in *Smith v. Evening News Association,* 371 U.S. 195 (1962).

In the *Smith* case the plaintiff, a member of a striking union, brought an action against his employer for breach of the collective bargaining agreement, alleging that the defendant employer, during the course of the strike, did not permit him to report for work although he was ready, willing and able to to do so, while it permitted other categories of non-union employees, employees not covered by the collective bargaining agreement, to do so even though there actually was no work available for them. The defendant refused to pay full wages to the plaintiff while making such payments to the non-union employees. The claimed violation of the collective bargaining agreement was with respect to the clause prohibiting "discrimination against any employee because of his membership or activity" in the union. The action was brought in a state court (Michigan) which dismissed "for want of jurisdiction on the ground that the allegations, if true, would make out an unfair labor practice under the National Labor Relations Act and hence the subject matter was within the exclusive jurisdiction of the National Labor Relations Board." The Michigan Supreme Court affirmed, 362 Mich. 350, in reliance upon *San Diego Building Trades Council v. Garmon,* 359 U.S. 236; *Garner v. Teamsters, etc. Union,* 346 U.S. 485; and *Weber v. Anheuser Busch,* 348 U.S. 468. The Supreme Court reversed and in doing so thereby disposed of the contentions of the defendants in this litigation not only with respect to the contention that this Court is without jurisdiction but, likewise, with respect to the con-

tention that the exclusive jurisdiction is with the National Labor Relations Board. The Supreme Court held that jurisdiction was concurrent—that the acceptance of jurisdiction by the one did not preclude the jurisdiction of the other and it went on to point out that the National Labor Relations Board was itself in accord with that conclusion (371 U.S., at 198). Mr. Justice White, writing for the Court, stressed that "Section 301 is not to be given a narrow reading" (371 U.S., at 199), and said:

> "*Lucas Flour* and *Dowd Box,* as well as the later *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed. 2d 462, were suits upon collective bargaining contracts brought or held to arise under Sec. 301 of the Labor Management Relations Act and in these cases the jurisdiction of the courts was sustained although it was seriously urged that the conduct involved was arguably protected or prohibited by the National Labor Relations Act and therefore within the exclusive jurisdiction of the National Labor Relations Board. In *Lucas Flour* as well as in *Atkinson* the Court expressly refused to apply the preemption doctrine of the *Garmon* case; *and we likewise reject that doctrine here where the alleged conduct of the employer, not only arguably, but concededly, is an unfair labor practice within the jurisdiction of the National Labor Relations Board. The authority of the Board to deal with an unfair labor practice which also violates a collective bargaining contract is not displaced by Sec. 301, but it is not exclusive and does not destroy the jurisdiction of the courts in suits under Sec. 301.*" 371 U.S., at 197. (Emphasis added.)

This holding applies with compelling force in this action. It has received not only wide acceptance and repetition, but extensive implementation as well. Thus in *Plumbers and Steam Fitters Union, Local No. 598 v. Dillion,* 255 F. 2d 820, 823 (9 Cir. 1958), it was held:

> "The breach of contract may, as here, also be the source of an unfair labor practice cognizable by the N.L.R.B., but the District Court is not thereby deprived of jurisdiction over the private action for breach."

In *Todd Shipyards Corp. v. Industrial Union of Marine and Shipbuilding Workers, Local 39,* 344 F. 2d 107 (2 Cir. 1965), it was held:

> "The union argued below that primary jurisdiction in this case lies with the National Labor Relations Board. This argument was correctly rejected by the District Court since the federal courts have concurrent jurisdiction in actions brought under section 301 despite the fact that the wrong alleged as the substance of the action might also constitute an unfair labor practice."

In *Gilmour v. Wood, Wire and Metal Lathers International Union, Local No. 74,* 223 F. Supp. 236, the Court held that in a Section 301 action "the jurisdiction of the N.L.R.B. and of the United States District Courts are quite independent of each other" and it went on to observe that:

> "Since this is a Section 301 suit, the 'pre-emptive' doctrine of the Garmon case by which all courts, state and Federal, are divested of jurisdiction

over suits involving unfair labor practices which are reposed in the exclusive primary jurisdiction of the N.L.R.B., is inapplicable. The Court in the Smith case followed Local 174, Teamsters, etc. v. Lucas Flour Co., 369 U.S. 95, 101 at Footnote 9, 82 S.Ct. 571, 575, 7 L.Ed. 2d 593; Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 82 S. Ct. 519, 7 L.Ed 2d 483; and Atkinson v. Sinclair Refining Co., 370 U.S. 238, 245, at Footnote 5, 82 S.Ct. 1318, 1323, 8 L.Ed. 2d 462. All of these were Section 301 suits where it was held that the pre-emptive doctrine had no place. The Court expressly refused to apply the pre-emptive doctrine of San Diego Bldg. Trades Council, etc. v. Garmon, 359 U.S. 236, 79 S.Ct. 772, 3 L.Ed. 2d 775; Garner v. Teamsters, etc., Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228, and Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546. None of these latter cases was a Section 301 suit, but each involved attempts to litigate unfair labor practices as opposed to breaches of contracts in the courts."

We note that Solicitor General Cox, on behalf of the National Labor Relations Board, filed a brief *amicus curiae,* expressing the view that ousting the Courts of jurisdiction under §301 in the *Smith* case would not only fail to promote, but would actually obstruct, the purposes of the Act. 371 U.S. at 198, fn. 6. "The Board has, on prior occasions, declined to exercise its jurisdiction to deal with unfair labor practices in circumstances where, in its judgment, federal policy would best be served by leaving the parties to other processes of the law. See, e.g., *Con-*

solidated Aircraft Corp., 57 N.L.R.B. 694; *Spielberg Mfg. Co.,* 112 N.L.R.B. 1080". *Ibid.*

The *Smith* Court also noted that *Textile Workers v. Lincoln Mills,* 353 U.S. 448 has long since settled the matter that §301 has substantive content and that Congress has directed the Courts to formulate and apply federal law to suits for violation of collective bargaining contracts, for §301 is not to be given a narrow reading. 371 U.S. at 199.

Following the landmark case of *Smith v. Evening News, supra,* the Supreme Court decided *Humphrey v. Moore,* 375 U.S. 335 (1964). In that case, two employers within a multi-employer multi-union bargaining unit entered into an agreement whereby one employer would purchase the operation of the other. When the employees of the "purchased" company were laid off, they filed grievances, asserting that their seniority should carry over to the new employer. The grievants were members of the union. A local joint committee of union and employer representatives (similar to the Joint Port Labor Relations Committee) acting under authority of the collective bargaining agreement, approved a revised seniority list whereby all employees of both employers would retain their respective seniority ratings. Some employees of the "purchasing" company were laid off and filed an action in a state court, seeking to enjoin the union and the company from carrying out the decision of the local joint committee to put the new seniority list into operation. As an alternative to injunctive relief, plaintiffs prayed for damages.

Initially, the Court summarized the controlling case law in the factual situation presented there, which is similar to that of the case at bench; 375 U.S. at 342:

> "The undoubted broad authority of the union as exclusive bargaining agent in the negotiation and administration of a collective bargaining contract is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. *Syres v. Oil Workers' Union,* 350 U.S. 892; *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768; *Turnstall v. Brotherhood of Locomotive Firemen and Enginemen,* 323 U.S. 210; *Steele v. Louisville and N. R. Co.,* 323 U.S. 192. 'By its selection' as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. *Wallace Corp. v. Labor Board,* 323 U.S. 248, 255. The exclusive agent's obligation 'to represent all members of an appropriate unit requires (it) to make an honest effort to serve the interests of all those members, without hostility to any . . .' and its powers are 'subject always to complete good faith and honesty of purpose in the exercise of its discretion.' *Ford Motor Company v. Huffman,* 345 U.S. 330, 337-338."

The Court further held the following allegations to be sufficient to constitute an action arising under Section 301 of the L.M.A.A.; that the union deceived the plaintiffs concerning their job and seniority rights; deceitfully connived with other employees and the International Union to deprive plaintiffs of

their employment rights; that plaintiffs were prevented from having a fair hearing before the local joint committee; that the local and international unions acted dishonestly; and that the employer was put on notice that the union was charged with dishonesty and a breach of duty. The discharge was alleged to have violated the contract. 375 U.S. at 343.

Although recognizing the differing views as to whether or not a violation of the duty of fair representation is an unfair labor practice under the Act, the Court found that it was not necessary to resolve that issue. "Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts; *Smith v. Evening News Association,* subject, of course, to the applicable federal law." 375 U.S. at 344. In a footnote (fn. 6, pp. 344-345), the Court noted that the union abandoned their position in the state courts that judisdiction of the state courts had been preempted by the federal statutes, and relied upon *Ford Motor Co. v. Huffman, supra,* that individual employees "may undoubtedly maintain suits against their representative when the latter hostilely discriminates against them." The Supreme Court also noted that in *Syres v. Oil Workers International Union,* 350 U.S. 892, it reversed and ordered further proceedings in the trial Court where individual employees sued the exclusive bargaining agent and the company to enjoin and declare void a collective bargaining agreement alleged to violate the

duty of fair representation, in the face of a contention that the employees should have brought their proceedings before the National Labor Relations Board.

The Supreme Court held, on the merits, that the union took its position honestly, in good faith and without hostility or arbitrary discrimination. 375 U.S. at 350. We believe that honesty and good faith of the defendants in deregistering plaintiffs in the instant case should be determined after a trial on the merits.

Although the majority of the Court treated *Humphrey v. Moore* as a breach of contract situation arising under Section 301, we note that Mr. Justice Goldberg, with the concurrence of Justices Douglas, Brennan and Harlan, would have treated the case as one where an individual employee was suing the union for breaching its duty of fair representation, a remedy which may also be extended to the employer. 375 U.S. at 356-357.

In *Fuller v. Highway Truck Drivers & Helpers Local 107,* 233 F. Supp. 115 (E.D. Pa. 1964), the plaintiffs sought damages and injunctive relief against the implementation of the decision of a joint employer-employee committee purporting to settle certain grievances in accordance with the terms of a collective bargaining contract. It was alleged that the employers of a multi-employer bargaining group violated the collective bargaining agreement to deprive plaintiffs of their seniority standing, and that the employers conspired with union officials, without the presence or knowledge of plaintiffs, to obtain a decision by the

Joint Area Committee, based upon facts not of record, adverse to the seniority rights of plaintiffs.

In answer to the union's contentions that the Court did not have subject matter jurisdiction, the Court pointed out that the union had confused the question of jurisdiction with the question of whether the complaint states a cause of action.

> "The complaint charges a violation of the collective bargaining agreement. Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, gives this Court jurisdiction in such cases. Whether or not the claim is well founded, is another and distinct question." 233 F. Supp. at 117.

The Court also denied the union's contention that the allegations charged a violation of its duty of fair representation, "arguably" constituting an unfair labor practice and hence within the exclusive competence of the National Labor Relations Board under the rule of the *Garmon* case. It was held that plaintiffs' assertion of a violation of the collective bargaining agreement as a result of a conspiracy between the employer and the union brought the case within the holding of *Humphrey v. Moore,* 233 F. Supp. at 119.

> "Indeed, the allegations in the instant action would appear to present a stronger case for the plaintiffs than Humphrey, since, in Humphrey, the complaint did not charge employer participation in the union's breach of its duty of fair representation". *Ibid.*

The cited case of *Fuller v. Highway Truck Drivers & Helpers Local 107,* also discussed the plaintiffs' request to review the decision determining the seniority of the Joint Area Committee, a committee similar to the joint employer-union committees in the instant case. In language appropriate to the case at bench, the Court said:

> "However, plaintiffs' complaint is not directed merely to the Committee's interpretation of the contract. They assert that construction was reached as the result of conspiratorial action between Local 107 and other teamster representatives on the one hand, and [the employers] on the other. The distinction lies at the base of the *Humphrey* decision, where the complaint alleged that the decision of a Joint Conference Committee dovetailing the seniority lists of the two companies violated Moore's rights because: (1) The Joint Committee exceeded its powers under the existing collective bargaining contract in making its decision dovetailing seniority lists, and (2) The decision of the Committee was brought about by dishonest union conduct in breach of its duty of fair representation. So far as here material, the [*Humphrey v. Moore*] decision held that both grounds stated a claim under §301 of the Act." *Id.* at 118-119.

The Court also held that the plaintiffs had standing to attack the decision of the Joint Area Committee, and that the complaint stated a cause upon which relief could be granted. *Id.* at 119.

In the instant case, the plaintiffs' complaint has attacked the rules under which they were deregistered

by the Joint Port Committee (paragraphs 21, 22, 23 and 30) and that the action by the Joint Port Committee was in violation of the terms of the collective bargaining agreement (paragraph 47). In addition, plaintffs contend that the Memorandum of March 18, 1958, was violated by the deregistration procedure followed by defendants. This Memorandum was, in effect, an amendment to the contract and the rationale of the *Smith* case applies for a breach of the amendment. *ILWU v. Kuntz,* 334 F. 2d 165, 170 (9th Cir. 1964).

In another District Court case, *Regan v. Ohio Barge Line, Inc.,* 227 F. Supp. 1013 (S. D. N.Y. 1964), the plaintiffs sued the union for conspiring and acting in cooperation and collusion with the employers "in that they condoned and permitted the wrongful discharge and termination of plaintiffs' employment without proper cause, and thereby waived any rights and protections of plaintiff under the (collective bargaining) agreement . . . which rights said Union had a duty to enforce in plaintiffs' behalf" and that such activity constituted a breach of the collective bargaining agreement and plaintiffs have exhausted the remedies available to them thereunder. *Id.* at 1013-1014. The Union moved to dismiss for lack of jurisdiction.

> "The amended complaints allege a violation of the collective bargaining agreement by District 50 in asserting that District 50 failed to protect the rights of the plaintiffs under the collective bargaining agreement. *Humphrey v. Moore,* 375 U.S. 335, 341-344, is authority that under these circumstances a cause of action is spelled out under

> Section 301. Accordingly, the motion of District 50 to dismiss for lack of jurisdiction the causes of action asserted against it must be denied." *Id.* at 1014.

See *N.L.R.B. v. Pennwoven, Inc.,* 194 F. 2d 521, 524 (5 Cir. 1952) which held that a violation of a labor contract between a union and an employer is not an unfair labor practice under the statute. This holding was followed in *Fibreboard Paper Products Corp. v. East Bay U. of Mach., Local 1304,* 344 F. 2d 300, 304 (9th Cir. 1965), *cert. denied* 382 U.S. 826.

Whether we assume *arguendo* that the 1963 amendments, pursuant to which the defendants claim the plaintiffs were deregistered, were in fact legally valid and binding because properly enacted or, if we assume, as the plaintiffs do in this action, that the 1963 amendments were invalid as a matter of law and consequently of no force and effect because enacted by the defendants in violation of the union's duty of fair representation and with the connivance of PMA, then it is nevertheless claimed by the plaintiffs that the agreement was violated by reason of the following: (1) that the plaintiffs have been deregistered in violation of the clear terms of the collective bargaining agreement since that agreement does not sanction such penalty for the claimed infractions which, in any event, are, in large measure, denied by the plaintiffs and which deregistrations, moreover, were motivated by hostility and bad faith on the part of the defendants, (2) because the plaintiffs were, with hostility and in bad faith, refused and denied equality

of treatment—that they were not in fact judged by the same standards—as all other persons similarly situated and (3) because the plaintiffs were, with hostility and in bad faith, deprived of the rights and remedies embodied in the agreement for their defense against the claimed violations—that the plaintiffs were illegally and improperly deprived of those rights spelled out in the agreement involving procedural due process and equal protection. That denial involved not only initially lack of notice, particularization of charges, right of confrontation and fairness of hearing, but likewise, subsequently, promptness in the operation of the internal grievance procedures. More specifically with respect to this latter, the appeals taken by the plaintiffs were totally disregarded and ignored until the defendants, awakened by the commencement of this action, offered to proceed with the appeals. And even then, they did not do so until a month after this action was commenced.

These, stated schematically, are some of the major aspects of the violations of the collective bargaining agreement and represent the core of the third cause of action. The cited authorities leave no doubt that these constitute not only a good cause of action upon which relief may be granted, but one with respect to which these plaintiffs have properly invoked the jurisdiction of the District Court.

C. IT WAS NOT NECESSARY FOR THE PLAINTIFFS TO PRESENT THEIR CLAIMS TO THE ARBITRATOR.

The District Court held that the plaintiffs have failed to exhaust their internal remedies, that they have failed to appeal to the Coast Arbitrator, the final step in the grievance procedure, and therefore, they have no standing to bring this action.

There are several conclusive answers to this contention.

The first is predicated on the explicit language of the collective agreement which does not give the plaintiffs the right to appeal to the Coast Arbitrator. The collective agreement makes the decision of the Joint Labor Relations Committee the final step in the grievance machinery available to the plaintiffs. Section 17.261 of the collective agreement provides:

> "17.261 Any decision of a Joint Port or Joint Area Labor Relations Committee or of an Area Arbitrator claimed by either party to conflict with this Agreement shall immediately be referred at the request of such party to the Joint Coast Labor Relations Committee (and, if the Joint Coast Labor Relations Committee cannot agree, to the Coast Arbitrator, for review). The Joint Coast Labor Relations Committee, and if it cannot agree, the Coast Arbitrator, shall have the power and duty to set aside any such decision found to conflict with this Agreement and to finally and conclusively determine the dispute. It shall be the duty of the moving party in any case brought before the Coast Arbitrator under the provisions of this 17.261 to make a prima facie showing that the decision in question conflicts

> with this Agreement, and the Coast Arbitrator shall pass upon any objection to the sufficiency of such showing before ruling on the merits."

Two comments may be made with respect to this quoted paragraph of the collective agreement. (1) The defendants stressed throughout all of their papers submitted to the District Court that the Joint Coast Labor Relations Committee agreed and found against the plaintiffs on November 20, 1964. The condition, therefore, which permits an appeal to the Coast Arbitrator, namely a failure of the Coast Labor Relations Committee to agree, does not exist. (2) Even if an appeal were permitted pursuant to this Section to the Coast Arbitrator, none of the plaintiffs would be entitled to take it because, according to the quoted section, such appeal must be at the request of a "party" and the agreement in its second preamble paragraph (page 1) makes clear that an aggrieved person is not a party and that the only parties are I.L.W.U. and PMA. Only parties may select the arbitrator, Section 17.51. Specifically, the collective agreement says:

> "The parties hereto are the International of the International Longshoremen's and Warehousemen's Union and the coastwide Pacific Maritime Association."

The only time an aggrieved person has the right under the collective agreement of appealing from the decision of the Joint Coast Labor Relations Committee to the Coast Arbitrator is when his complaint is

one that falls within the terms of Section 13.1 of the collective agreement and which reads as follows:

> "There shall be no discrimination in connection with any action subject to the terms of this Agreement either in favor of or against any person because of membership or nonmembership in the Union, activity for or against the Union or absence thereof, or race, creed, color, national origin or religious or political beliefs."

But the complaint of these plaintiffs does not fall within the ambit of the quoted section of the collective agreement. Their complaint of unfair representation does not fall within it. Their complaint of discrimination does not fall within it. Each of the plaintiffs wrote a letter of appeal on or about July 27, 1963, of which the following is a sample:

> "July 27, 1963
>
> R. R. Holtgrave, Secretary
> James Kearny, Chairman
> JLRC (PMA-ILWU)
> 16 California Street
> San Francisco, California
>
> Dear Sirs:
>
> Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.
>
> I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination.

I have never been able to get from you an official statement specifying the alleged charges against me, nor did your committee produce documents to substantiate the charges.

Would you please correct this situation for the next hearing.

Sincerely,"

The fact that the defendants *for the first time, long after this litigation was first commenced,* for their own ulterior purposes, designated the complaints of the plaintiffs as being complaints of discrimination falling within the ambit of Section 13.1, does not make them such. The complaints of these plaintiffs are governed by the second sentence of Section 17.2 which reads as follows:

"17.2 Grievances arising on the job shall be processed in accordance with the procedure hereof beginning with 17.21. Other grievances as to which there are no specific provisions herein shall be processed in accordance with the provisions hereof beginning with 17.23."

Section 17.261 which was quoted supra, is the culminating section which commences with Section 17.23. For the information of this Court those intermediate sections read as follows:

"17.23 If the grievance is not settled in 17.21 and 17.22 or does not arise on the job, it shall be referred to the Joint Port Labor Relations Committee which shall have the power and duty to investigate and adjudicate it.

"17.24 In the event that the Employer and Union members of any Joint Port Labor Rela-

tions Committee *shall fail to agree upon any question before it,* such question shall be immediately referred at the request of either party to the appropriate Joint Area Labor Relations Committee for decision.

"17.25 In the event that the Employer and Union members of any Joint Area Labor Relations Committee *fail to agree on any question before it,* such question shall be immediately referred at the request of either party to the Area Arbitrator for hearing and decision, and the decision of the Area Arbitrator shall be final and conclusive except as otherwise provided in 17.26. (Emphasis added.)

"17.26 The Joint Coast Labor Relations Committee has jurisdiction to consider issues that are presented to it in accordance with this Agreement and shall exercise such jurisdiction where it is mandatory and may exercise it where such jurisdiction is discretionary as provided in 17.261, 17.262 and other provisions of this Agreement."

There is, consequently, no basis for the claim on the part of the defendants that the plaintiffs failed to exhaust their internal remedies by appealing to the Coast Arbitrator.

The second conclusive answer to the defendants' contention is that, in point of fact, they have been denied access to the grievance machinery provided and, consequently, as a matter of law, they not only have a good and meritorious cause of action for breach of the collective agreement on this very ground but, moreover, they were under no duty or obligation

to pursue the internal grievance machinery beyond that point at which their access to it has been denied to them by the total inaction of the defendants. It may be added that when consideration is given to the entire underlying factual pattern which discloses not only that the plaintiffs were effectively denied access to the grievance machinery by the complete inaction and disregard of their appeal, but likewise also in the prior "hearings" in which all the fundamental criteria of procedural fairness were absent or refused, the conclusion becomes inescapable that such denial, that such inaction, was in bad faith, that it was but another aspect of the entire pattern of hostile discrimination by the defendants toward the plaintiffs.

The factual background which serves to support these statements has been set forth at length in the affidavit of Stanley L. Weir, one of the plaintiffs in this action, and will not be repeated here. Suffice it to note, however, that on July 27, 1963, each of the plaintiffs appealed the deregistration decision of June 17, 1963, and the affirmance of that deregistration on July 23, 1963. They each did so by identical letters, a copy of one of which has been reproduced *supra*. There was no response of any kind from the defendants or from the Joint Labor Relations Committee to these appeals. Although repeated attempts were made by the plaintiffs to learn the status of their appeals, none of them were able to obtain any information whatsoever. In fact, as the accompanying affidavit makes clear, they were informed that the decision was final and that they had no right of further

appeal. This information may well have been correct as reference to Section 17.24 of the collective agreement seems to indicate. Be that as it may, the plaintiffs attempted to obtain action on their appeals of July 27, 1963, and they waited nearly nine months with that hope until on April 14, 1964, they finally instituted this action. The entire period between the time the plaintiffs filed their appeals on July 27, 1963, until the commencement of this action was marked by the refusal of these defendants, through their instrumentality, the Joint Labor Relations Committee, to take any action whatsoever on the pending appeal. These facts, we respectfully submit, leave no other conclusion possible than that the defendants, by failing and refusing to process the appeals by the plaintiffs have effectively denied to the plaintiffs access to the internal grievance machinery.

In *Born v. Cease,* 101 F. Supp. 473, 475, the Court aptly held:

> ". . . the proceedings governing appeals within labor unions . . . should be 'plain, speedy and adequate'. The plaintiff had no appeal within the union in the true sense of the word . . ."

Certainly there was nothing "plain, speedy and adequate" about the internal grievance procedures here involved. And adequacy along with promptness are the key factors to be considered. In the leading case recently decided by the United States Supreme Court, *Republic Steel Corporation v. Maddox,* ..... U.S. ....., 85 S.Ct. 614, 13 L.Ed. 2d 580, these considerations form the crux of the ruling. In that case,

the plaintiff made no effort whatsoever to utilize the grievance machinery provided and Mr. Justice Harlan writing for the Court therefore reversed an Alabama State Court judgment in his favor. In the course of doing so, Mr. Justice Harlan said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See Humphrey v. Moore, 375 U.S. 335, 84 S.Ct. 363, 11 L.Ed. 2d 370; National Labor Relations Board v. Miranda Fuel Co., 2 Cir. 326 F. 2d 172. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf." (85 S.Ct. at 616; emphasis in original.)

Moreover, added the Supreme Court:

> "And it cannot be said in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so."

We submit that in the instant case there can be no doubt that the plaintiffs did attempt to use the contract grievance procedure, that the union not only refused to assist them but, in fact, acted as their prosecutors and that the plaintiffs found those procedures inadequate to protect their interests after a

strenuous attempt to implement them. *Republic Steel Corporation v. Maddox,* therefore, entirely and unequivocally supports the position of the instant plaintiffs. A host of other authorities equally sustain the position of the plaintiffs.

In *Booth v. Security Mutual,* 155 F. Supp. 755, 762, it was held:

> ". . . defendants raise the objection that the union constitution and by-laws present channels through which the plaintiffs must first seek to obtain their rights before resort to the courts. To this it need only be said that two years of inaction by the union and its high officials in taking any steps against those primarily responsible . . . make it apparent that any such intra-union remedy is presently without avail. Doubtless, it is for that very reason that the plaintiffs have filed the present suits."

In *Flaherty v. McDonald,* 178 F. Supp. 544, which was an action by officers of a local union demanding that control of the local be returned to its elected officers by the International Union, the Court held:

> "As a general rule one of the contracting parties cannot ignore portions of a contract and yet insist the other party live up to its terms. The contract is binding on all parties or on none. In this particular case, International disregarded its contractual obligation relative to charges and trials of Local officers. It appears to the Court that International is in poor grace when it insists that it can disregard that portion of the Constitution relative to charges and trials and yet insist that those who have been deposed by International's

> action, contrary to its own Constitution, will have to take an appeal in compliance with the terms of the Constitution before having recourse to the courts. '. . . he who demands the protection of the constitution should in the first instance give that protection.' Underwood v. Maloney, D.C., 152 F. Supp. 648 at page 667." 178 F. Supp. at 550.

The opinion in *Flaherty v. McDonald* emphasized further:

> "Time is of the essence in this matter. . . . If plaintiffs are to have any relief at all from the administrative remedies, that relief must be prompt." 178 F. Supp. at 550.

Moreover, the Supreme Court made clear in *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448, that it is the duty of the federal Courts to fashion a body of substantive federal law from "the penumbra of express statutory mandates" and that "the substantive law to apply in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws". In this connection our national labor laws do give more than an indication of what Congress deems a reasonable period of time beyond which it is improper to require the exhaustion of internal remedies. The Labor Management Reporting and Disclosure Act of 1959 provides (29 U.S.C., Sec. 411(a) (4)) that, "any such member may be required to exhaust reasonable hearing procedures (but not to exceed *a four-month lapse of time)* within such organization, before instituting

legal or administrative proceedings against such organizations or any officer thereof." (Emphasis added.)

Certainly the eight and three-quarter month period of deliberate inaction on the part of these defendants before the commencement of this litigation is unreasonable and when considered in connection with the entire course of conduct of the defendants prior thereto, denying as it did every semblance of fairness in the operation of the grievance machinery, must be deemed an absolute denial of access to the internal grievance machinery provided.

In the leading case of *Detroy v. American Guild of Variety Artists,* 286 F. 2d 75 (2nd Cir. 1961) *cert. den.,* 366 U.S. 929, the Court in dealing with the four-month exhaustion period provided under Section 101 of Landrum-Griffith pointed out in language applicable here that:

> ". . . the proviso dictated an outside limit beyond which the judiciary cannot extend the requirement of exhaustion—no remedy which would require proceedings exceeding four months in duration may be demanded. We, therefore, construe the statute to mean that a member of a labor union who attempts to institute proceedings before a court or an administrative agency may be required *by that court or agency* to exhaust internal remedies of less than four months' duration before invoking outside assistance." 286 F. 2d at 78. (Emphasis in original.)

The opinion then continues:

> "Section 102, under which the appellant instituted his proceeding, provides for enforcement

by federal courts of rights assured by federal law. We are not in this case, therefore, bound by the doctrine of exhaustion as developed in the New York, Nevada, or California courts with respect to suits against unions brought in the courts of those states by union members. In enforcing rights guaranteed by the new statute, whether or not similar rights would be enforced under state law by state courts, the federal courts may develop their own principles regarding the time when a union's action taken in violation of Sec. 101 is ripe for judicial intervention. Cf. Holmberg v. Armbrecht, 1946, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743; Sola Electric Co. v. Jefferson Electric Co., 1942, 317 U.S. 173, 176-177, 63 S.Ct. 172, 87 L.Ed. 165. The rules formulated by various state courts may suggest helpful avenues of approach, cf. Textile Workers Union of America v. Lincoln Mills, 1957, 353 U.S. 448, 457, 77 S.Ct. 912, 1 L.Ed. 2d 972, but the authority granted to the federal courts by Congress to secure the rights enumerated by Sec. 101 of the 1959 Act is accompanied by the duty to formulate federal law regarding a union member's obligation to exhaust the internal union remedies before seeking judicial vindication of those rights."

Moreover, said the Circuit Court in the *Detroy* case:

"If we look to the substantial body of state law on the subject, we find that the general rule requiring exhaustion before resort to a court has been almost entirely swallowed by exceptions phrased in broad terms. . . .

"The Congressional approved policy of first permitting unions to correct their own wrongs is

> rooted in the desire to stimulate labor organizations to take the initiative and independently establish honest and democratic procedures. . . . Other policies, as well, underlie the exhaustion rule. The possibility that corrective action within the union will render a member's complaint moot suggests that, in the interest of conserving judicial resources, no court step in before the union is given its opportunity. . . . See Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J. 175, 207 (1960). Congress has provided a safeguard against abuse by a union of the freedom thus granted it by not requiring exhaustion of union remedies if the procedures will exceed four months in duration. But in any case, if the state of facts is such that immediate judicial relief is warranted Congress' acceptance of the exhaustion doctrine as applied to the generality of cases should not bar an appropriate remedy in proper circumstances."

We have shown the manifest improprieties in the proceedings involving the deregistration of these plaintiffs even long prior to the taking of their appeal on July 27, 1963. We have shown that the "hearings" granted them were largely a farce, that they were not furnished with statement of the charges against them, that they were asked to defend themselves without being given the particulars upon which they could formulate a defense, and that they were denied not only counsel but any assistance including representation by their ostensible bargaining representative, the union defendants. These facts, by their very recitation, reveal such a violation of their rights as makes

inapplicable any requirement that they further exhaust internal remedies since, at every stage up to the time they took their abortive appeal, the evidence demonstrates the violation of their rights under the collective agreement and the predetermination in the minds of those who would, under the internal remedies provided, pass upon the appeal.

The remark in Summers, Union Powers and Workers' Rights, 49 Mich. L. Rev. 805, 820 (1951), is apposite in this connection:

> "The rights which a worker should have in the union which acts as his economic government are essentially the rights of a citizen in a democratic state. . . . Most important is the right to participate fully and freely in making the laws under which he lives. *If this right of an individual worker within his union is not protected, then collective bargaining has not brought him freedom but an additional master.*"

In *Nelson v. Johnson,* 212 F. Supp. 233, which was a case brought by union members against the president and treasurer of a local union under Landrum-Griffin alleging that the defendants violated the act in failing to hold money and property solely for the benefit of the union and expended in accordance with the union's constitution, by-laws and resolutions. The Court said at page 255:

> "Can the national governing body of a union discourage resort to the federal courts when internal redress for patent federal wrongs has proven futile in the past? The answer is no."

In *Parks v. International Brotherhood of Electrical Workers,* 314 F. 2d 886 (4th Cir., 1963) *cert. den.,* 83 S.Ct. 1111, it was said at pages 924-925:

> "Although there is a common law doctrine that parties are not entitled to judicial relief until they have exhausted intra-union remedies, there are a number of well-recognized exceptions. . . . Exceptions are recognized when resort to the internal appeal would be unreasonably burdensome because of delay likely to result in irreparable injury."

The Court in the *Parks* case stated further, at page 925, that:

> ". . . section 101 (a) (4) . . . provides an authoratative expression of Congressional labor policy, it is, insofar as it may modify the common law exhaustion doctrine, a prime source upon which the court should draw in formulating the federal law. . . ."

It, thereafter, added at page 925:

> "The four-month limitation in the proviso has been subjected to various interpretations. We agree, however, with the District Court's conclusion that 'whatever construction is placed' on this proviso (203 F. Supp. at 296), these suits are barred neither by the statutory limitation nor by common law exhaustion doctrine. When these suits were brought, all internal remedies, available within four months of revocation, had been exhausted. To insist upon full exhaustion of remedies would be to impose an unreasonable delay in the adjudication of plaintiffs' rights and would result in irreparable harm to plaintiffs."

In *Gainey v. Brotherhood of Railway & Steamship Clerks,* 313 F. 2d 318 (1963), the Court said at page 322:

> "The use of the word 'decision' would indicate that the Grand President must dispose of the issue before an aggrieved member could go on to the Council. There is nothing in the Brotherhood governing laws which gives the plaintiffs a right to appeal from the inaction of the Grand President: on the contrary, the entire appellate procedure is predicated on the existence of a decision at each stage. In view of the fact that plaintiffs were effectively stopped from obtaining a final union disposition of their grievance and having very much in mind the time element involved we find that the allegations in their complaint make an adequate representation that they have taken all reasonable steps available to them within the Brotherhood's internal structure."

In a case where the administrators of an estate alleged that decedent was unlawfully discharged by his employers with the knowledge, consent and connivance of the union and deprived of certain benefits in violation of the collective bargaining agreement, the Second Circuit held as follows with regard to the arbitration provisions of the contract:

> "It is true that the collective bargaining agreements contain arbitration clauses and that if this were simply a suit for wrongful discharge, the arbitration clauses would be available to the employers as a defense. (citations)) *But where the employee's case is based upon a conspiracy between his union and his employer to deprive him of his rights, he cannot be forced to submit that*

issue to an arbitration between the employer and the union. Such a procedure would fail completely to settle the issues between the union member and his union. It would entrust representation of the employee to the very union which he claims refused him fair representation, and it would present as adversaries in the arbitration procedure the two parties who, the employee claims, are joined in a conspiracy to defraud him.

"That (District) Judge Bryan had misgivings along the lines we have indicated is evidenced by his having included in his order (staying the action pending arbitration) provision for the plaintiffs to have separate representation at the arbitration and a voice in choosing the arbitrator. However, the arrangement fails to cure the defects, since the plaintiffs would still be aligned on the side of their adversary, the union, or, if not, the order would have to be construed as forcing the plaintiffs to arbitrate issues with employer and union which neither they nor their decedent ever agreed to arbitrate." *Hiller v. Liquor Salesmen's Union Local No. 2,* 338 F. 2d 778, 779-780 (2nd Cir. 1964). (Emphasis added.)

Finally in *Samsing v. S & P Company,* 325 F. 2d 718 (1963), the Court of Appeals for the Ninth Circuit in a Per Curiam opinion held:

"Appellant brought suit under Section 301 of the Labor-Management Relations Act, 1947 (29 U.S. C.A. Sec. 185(a) to recover wages and other benefits allegedly due under a collective bargaining agreement. The District Court dismissed the complaint on the ground that it appeared from the complaint and attached agreement that the

appellant had not exhausted his administrative remedies.

"The collective bargaining agreement simply set out the administrative procedures to be followed in settling grievances. The complaint alleged that 'plaintiff has exhausted all of the administrative remedies provided for in said labor agreement or he has attempted to so comply.' Appellee asserts that this allegation is to be ignored as 'a mere conclusion, wholly uninformative as to what he claimed to have done to comply or attempt to comply.' We think it was sufficient to withstand a motion to dismiss, for 'the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.' Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 102-103, 2 L.Ed. 2d 80 (1957)."

D. JURISDICTION OVER THE INDIVIDUAL DEFENDANTS

The District Court did not specifically rule on whether or not it had jurisdiction over the individual defendants, although this issue was raised by defendants. Plaintiffs contend there was pendent jurisdiction over the individual defendants.

"Pendent jurisdiction became firmly embedded in federal law by the decision of the Supreme Court in *Hurn v. Oursler,* 289 U.S. 238 (1932), which has been cited and relied on many times by the federal courts. . . . Under *Hurn,* piecemeal adjudication of a claim by different courts was eliminated. When a substantial federal claim is asserted, the federal court has jurisdiction to

> fully determine it, including its local aspects. The federal and state claims are regarded merely as different grounds to support a single cause of action. (citation). This permits an award of punitive damages where authorized by state law. (citation)." *Price v. United Mine Workers of America,* 336 F. 2d 771, 775 (6 Cir. 1964), *cert. denied,* 380 U.S. 913.

California state law recognizes the tort of intentional interference with a contractual relationship, *Herron v. State Farm Mut. Ins. Co.,* 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294 (1961), the basis of the fourth and fifth causes of action of the complaint.

A recent case discussing this problem in a labor context was *Mine Workers v. Gibbs,* 383 U.S. 715, 725-27 (1966). See an extensive note on this subject in 5 ALR 3rd 1040.

See also *Sidney Wanzer & Sons, Inc. v. Milk Drivers U. Local 753,* 249 F. Supp. 664 (N.D. Ill. 1966). This was an action by an employer against the union and individual union officers. The Court held there to be jurisdiction for actions against individuals (at p. 668) and a remedy of exemplary damages (at p. 671) under § 301.

E. THERE WAS NO EXPIRATION OF ANY STATUTE OF LIMITATIONS

As noted throughout this brief, a period of eight and three quarter months elapsed between the deregistrations of plaintiffs and the filing of this action.

The District Court, in holding that the applicable statute of limitations had expired, apparently applied the six month period of Section 10(b) of the Act, which specifically applies to unfair labor practice charges. The Act is silent with regard to other actions which may be brought thereunder.

The statute of limitations for actions brought under Section 301 is to be determined by state law. *Auto Workers v. Hoosier Corp.,* 383 U.S. 696 (1966). This rule was applied last year by this Court in *International U. of Op. Eng. v. Fishbach & Moode, Inc.,* 350 F. 2d 936 (9th Cir. 1965).

A similar rule has been adopted by the Wisconsin Supreme Court which refused to invoke "judicial inventiveness" to make the six month limitation specified for unfair labor practices applicable to breach of contract actions. *Tully v. Fred Olson Motor Service Co.,* 27 Wis. 2d 476, 134 N.W. 2d 393 (1965).

The statute of limitations in California is four years on a written contract (California Code of Civil Procedure, § 337, subd. 1), two years on a contract not in writing (Code of Civil Procedure, § 339, subd. 1), and one year for liability created by a statute (California Code of Civil Procedure, § 340, subd. 1). There was no expiration of any of these applicable statutes, and plaintiffs' action, filed within nine months of the wrongful acts of defendants, was timely.

F. THERE WERE GENUINE ISSUES OVER MATERIAL FACTS RAISED BY THE AFFIDAVITS OF THE PARTIES.

The affidavits submitted by defendants were directed toward the issue of "cause" for the plaintiffs' deregistrations. Defendants alleged that plaintiffs were deregistered pursuant to rules and regulations which were violated by plaintiffs. The affidavit of plaintiff Weir, and the other documents submitted by plaintiffs, denied that they were guilty of any violations and challenged the very existence of any rules authorizing these deregistrations. The allegations of Mr. Weir concerning threats and intimidations from union officials because of his leadership of the B men and his open criticism of the policies of the P.M.A. and I.L.W.U. are uncontroverted in the record. The evidence that B men were deregistered for offenses while A men were given only nominal punishment (if any) for the same and more aggravated offenses is also uncontradicted. Plaintiffs' version of the entire deregistration proceedings indicates a denial of industrial due process which

> ". . . would effectively undermine the decision of the Joint [Port Labor Relations] Committee as a valid basis for . . . [plaintiffs'] . . . discharge." *Humphrey v. Moore,* 375 U.S. 335, 343.

From the above examples, we submit that these were issues which should not have been determined in summary fashion.

V

CONCLUSION

For the foregoing reasons, this matter should be reversed and remanded to the District Court for a trial on the merits.

Dated, San Francisco, California,
September 1, 1966.

Respectfully submitted,
IRVING A. THAU,
FRANCIS HEISLER,
ARTHUR BRUNWASSER,

By ARTHUR BRUNWASSER,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR BRUNWASSER,
Attorney for Appellants.

(Appendix Follows)

Appendix

Appendix

In the United States District Court for the Northern District of California,
Southern Division

No. 42,284

George R. Williams, et al.,
Plaintiffs,

vs.

Pacific Maritime Association, a non-profit corporation; International Longshoremen's and Warehousemen's Union, an unincorporated association, et al.,
Defendants.

AFFIDAVIT OF STANLEY L. WEIR IN OPPOSITION TO MOTIONS TO DISMISS

State of California
City and County of San Francisco—ss.

Stanley L. Weir, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I make this affidavit in opposition to the several motions now before this Court, made by the defendants pursuant to Rule 12 of the Federal Rules

of Civil Procedure, which seek a dismissal of the Fourth Amended Complaint.

I was registered by the San Francisco Joint Port Labor Relations Committee on June 1, 1959, pursuant to the terms of an amendment to the then existing collective bargaining agreement. The amendment is entitled "Memorandum of Rules Governing Registration and De-Registration of Longshoremen in the Port of San Francisco", dated March 18, 1959. A photostatic copy of this Memorandum is annexed to the Fourth Amended Complaint as Exhibit "A" and will hereinafter be referred to as the 1958 Memorandum. I was summarily de-registered on June 17, 1963, by the San Francisco Joint Port Labor Relations Committee without prior notice, without specification of purported charges and without any opportunity to be heard allegedly pursuant to the terms and provisions of Section 9 of the 1958 Memorandum.

It is my contention that I was de-registered by the Joint Port Labor Relations Committee in violation of the express terms, conditions and provisions of the 1958 Memorandum; that I was not afforded, and the defendants wilfully refused and denied me, the benefit of the provisions therein contained (and, likewise, those contained in the basic collective agreement, the Pacific Coast Longshore Agreement: 1961-1966) respecting procedural due process and equal protection; that in every basic respect I was denied and refused by the union defendants the fair representation to which I am entitled both under the collective agreement and as a matter of law; that the defendant

PMA actively participated in that denial and refusal of fair representation by the union defendants; that I am not, in fact, guilty of any infraction of the rules which governed my conduct as a Class "B" longshoreman which I *infer* are charged against me by the Joint Port Labor Relations Committee; that I am only able *to infer* what those charges may be because at no time prior to my de-registration was I furnished with the particulars of the alleged charges against me by the Committee notwithstanding the fact that I made both oral and written demands therefor; that for reasons which will become clear hereinafter I am still not certain precisely what alleged charges there were against me, if any, at the time of my de-registration; that I have been denied equality of treatment with all other Class "B" longshoremen similarly situated; and that, finally, my de-registration was the outcome of hostility, malice and bad faith on the part of the defendants.

I recognize that the statements I have just made are, to a certain extent, merely conclusions. However, I represent to this Court that I shall in the balance of this affidavit (and, of course, ultimately on the trial of this action) demonstrate the underlying facts which compel these conclusions and to satisfy this Court with respect to their truthfulness.

During the latter half of 1962, the Class "B" longshoremen were informed by officials and representatives of the union defendants that, very shortly, the "freeze" which had been imposed early in 1960 on the promotion of Class "B" longshoremen to Class

"A" would be rescinded and that, upon its occurrence, the Class "B" longshoremen would rapidly be moved into the Class "A" category. The lifting of the freeze actually occurred soon thereafter, and by February of 1963 the procedures for such transfers were underway.

The first notice to the Class "B" longshoremen that the procedures were actually in motion came with notification that the defendant, Local No. 10, was conducting an investigation of our eligibility for membership in the union. (We were told to pick up, complete and execute application forms for membership in the union.) I received such notification in the form of an undated letter approximately a week prior to February 26, 1963. The letter to me, on the stationery of Local No. 10, reads as follows:

> "Please be advised that it will be necessary for you to appear before our Investigating Committee to be investigated for possible membership in the Union.
>
> The meeting will be held on FEB 26, 1963 at 7 p.m. You are to report to the lobby of the Union office, 400 North Point Street, San Francisco.
>
> Please bring your local 10 Class 'B' Book with you and make the following records available to the Committee if you have them:
>
> 1. Previous membership in any union
> 2. Strike records
> 3. Withdrawl (sic) cards
>
> You will have to come in to the Union Office before the above meeting and file your applica-

tion, which is enclosed, and also deposit the sum of $10.00 which shall be the initiation fee.

Membership action of March 7, 1960.

M/S/C That all new 'B' members are required to pay the current building payments when initiated.

This means that the total sum paid by 'A' members to date prior to your initiation is $216.00"

On February 26, 1963, I appeared before the Investigation Committee of Local No. 10 as directed.

Parenthetically, I believe it important to emphasize that this was an investigation to determine my eligibility for union membership, not for transfer to Class "A" status. There is no closed shop. There are, in fact, Class "A" longshoremen who are not members of the union. The two categories are not identical.

When I appeared before the Investigating Committee of Local No. 10, I observed that its Chairman that evening was Carl Smith, that there were two Sargeants of Arms, Odel Franklin and Benny Hunter, and that there were also present, among others, one Anderson, a gang boss, whose first name I do not know, Dave Littleton, John Rutter and Thomas Silas. The latter, Thomas Silas, although present was not a member of the Investigating Committee. I was asked initially to hand over my completed and executed application for membership in the union in duplicate which, among other things, provided that the appli-

cant agreed thereby to work in the hold, that is, at the most demanding, taxing and difficult longshore work, for an additional period of five years if admitted into the union.* I was then asked for my records in other unions and related documents, which after being examined and found to be unobjectionable, were returned to me. I was thereupon told I was clear for union membership. I was told this after John Rutter had announced to the Committee that the only possible violation he had discovered against my record was that I had dropped four hours in low-man-out violations in 1962. No date was specified for these possible violations, and since they, in any event, were within

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*The Memorandum of 1958 contained provisions with respect to the relative seniority of Class "A" longshoremen, Class "B" longshoremen and casuals. In Section 1 the Memorandum of 1958 states:

"Section 1. *Seniority Groups.*

Longshoremen employed shall fall in the following categories:

A. Registered Longshoremen.

B. Limited Registration Longshoremen.

Other workers doing longshore work (Social Security men) are casuals and have no seniority rights or registration status."

These provisions respecting seniority receive part of their practical application in the "Rules and Regulations Governing Low-Man-Out System of Dispatch for Individual Longshoremen" of December 30, 1958, adopted by the San Francisco Port Labor Relations Committee (hereinafter referred to as Low-Man-Out Rules). For this Court's information, a true copy of these Low-Man-Out Rules are hereto annexed, made part hereof and marked Exhibit "A". The significance of the agreement the union sought from each prospective Class "A" applicant with respect to the condition requiring the applicant to work five years longer in the hold, is that the union sought, unilaterally and in spite of the terms of the collective agreement, to create, even among the Class "A" men, a five-year category of second-class "citizenship", so to speak. This is a salient matter which will, in view of certain facts to be related hereinafter, take on even greater importance when integrated with those matters to be discussed hereinafter.

the ten-hour allowable limitation, I was clear. I was about to be dismissed when Thomas Silas approached John Rutter and handed him one or more slips of paper. After looking at them, John Rutter said, in substance, "Wait a minute. Silas says that you have some other low-man-out violations and that altogether your total low-man-out violations are thirteen and one-half hours. That is more than the ten-hour allowable limit. You are not clear." I asked for the dates of such violations. I said that I did not have any such violations, that I had my records with me and that, if they gave me the specific dates the violations were supposed to have occurred, I was prepared, then and there, to defend myself and demonstrate that the charge was baseless in all respects. The Chairman, Carl Smith, then told me that as of that evening they had changed their procedural rules, that they were not permitting anyone to defend himself before the Committee that evening, and that I could, by going to the records checker's office at 400 North Point Street, the following morning, do so there. I then said to the Chairman, "Is there any procedure for returning here, after I clear myself at the records checker's office tomorrow?" John Rutter then spoke up and said, "I am the records checker. If you clear yourself with me tomorrow morning, I'll see to it that you get back here." It was then that I was dismissed by the Investigating Committee.

At nine o'clock the following morning, when the records checker's office opened, I was there. John Rutter and Odel Franklin were both present. I spoke

to Rutter and asked him to get my records together in order that we might go over them. He was visibly embarrassed but finally said that he was going to let the man who had been *specially* handling my case do that. He then picked up the phone and spoke to Thomas Silas and asked him to come over to the office. I waited and finally Silas arrived and got my records together. He first accused me of dropping six hours on the low-man-out system on April 23, 1962. I pointed out to Silas that this did not represent a violation on my part, that it represented an error on the part of the dispatcher and that when I discovered the error a day or two later, I took it up with the dispatcher and the error was corrected. Silas turned to the pages for the following days and, indeed, found what I told him was in fact true. He then said, "Well, that eliminates that charge." He then presented me with a charge that I had a two-and-one-half hour violation on either May 2nd or 3rd of 1962. I then went over that charge with him in detail and showed him that it again represented a mere bookkeeping error which was discovered shortly after it occurred and that it was immediately corrected after its discovery. He thereupon went over the records and agreed that the charge was unfounded. He then said to me, "Well, that eliminates that charge, too. You will hear from us by mail." I then said, "Wait a minute. Last night you accused me of thirteen-and-one-half hours of violations. Let us go through the other five hours you accused me of and see if they exist." Odel Franklin, who had been

listening, interjected himself and said, "Yeah, you might as well get them all while you are at it." But Silas, after saying that it was not necessary to check the others since they were less than ten hours, finally admitted that he had nothing further. I then became angry and said, in effect, "What is going on here? Even if I had been guilty of the eight-and-one-half hours of violations which you took up with me this morning and which I showed you didn't exist, I would have still passed last night since the allowable number was ten. Why did you accuse me of thirteen-and-one-half hours?" Silas did not reply.

While this was going on between Silas and me, the Secretary-Treasurer of Local No. 10, Reino Erkilla, was present on some other business but was listening to the entire conversation. He, too, became irritated at the obvious frame-up that had occurred and turned to Silas and said, "Is this man clean or isn't he?" Silas said that I was but that he had no power to change the decision of the Committee. Only the Committee could change its own decision. I said, "Why don't you cite me for tonight? The Committee is meeting and I am available." Silas replied, "No, we can't do that, but we will notify you by mail." Mr. Erkilla then said, "Well, for what date are you going to cite him?" Odel Franklin said it would be done for the following Monday evening and Silas replied that that would be a proper time. I left the records checker's office at this point.

A day or two later I received another undated letter from Local No. 10, identical with the first, but

calling for my appearance before the Investigating Committee on the evening of March 4, 1963. A photostatic copy of that letter is hereto annexed as Exhibit "B". I appeared as directed. When I arrived, I found that Odel Franklin was in charge of scheduling the order of the appearance of the men before the Committee. He said to me that I was not on the agenda for that evening. I asked him why not and showed him my letter calling for my appearance. He said, "I'll go in and talk to the Committee and see what they want to do about it." He came out a few minutes later and told me that the Committee was not going to see me; that instead they had passed a procedural motion that evening to the effect that they would not see any applicant whom they had previously interviewed. I did not go before the Committee that evening nor was I ever permitted to do so thereafter. I, therefore, wrote the following letter to Mr. James Kearny, the President of Local No. 10:

"1720 Buena Avenue
Berkeley, 3, California
March 8, 1963

Mr. James Kearny
500 Northpoint Street
San Francisco, California

Dear Brother Kearny:

I am writing this letter to ask for your help in clearing my name. At last night's Local 10 meeting the International President, Harry Bridges, made it very clear that the Local's Investigating Committee has rejected the men it considered chiselers, dues delinquents, and contract violators.

I cannot disagree, but the Committee can make mistakes as was pointed out in the meeting.

At least one mistake was made that I know of. They rejected me for chiseling thirteen and one-half (13½) hours, or three and one-half (3½) over the allowable in the April-May period of last year.

The next morning, as requested, I went to the Union Record Checkers to clear myself. Their records showed nine (9) hours. While this was less than the allowable ten (10) hours, I showed that even this number was in error.

In spite of this my case was sent to another and higher committee that handles men who didn't pass. I was not given a chance to prove my innocence to the Local 10 Investigating Committee as I had been promised.

I want the chance to clear myself and correct the mistake before the Investigating Committee so that I can be registered along with the other men who were able to meet that Committee's standards.

Fraternally,
Stanley Weir #80524"

This letter which was sent to Mr. Kearny by registered mail never evoked a response or acknowledgment. I could obtain no further information as to my status even though I repeatedly inquired, except that the entire matter was in the hands of the Joint Port "B" Labor Relations Committee of which John Trupp of PMA and William Chester of Local No. 10 were the joint co-chairmen. Finding my search for infor-

mation frustrated in every direction, I finally on May 14, 1963, sent identical telegrams to both Trupp and Chester in their capacities as joint co-chairmen of the Committee. These identical telegrams read as follows:

> "DEAR SIR THIS IS TO AVOID ANY POSSIBILITY OF A MISTAKE I HAVE BEEN INFORMED BY LOCAL UNION OFFICIALS THAT YOUR COMMITTEE MAY STILL HAVE ME LISTED WITH THE SAME LMO VIOLATIONS THAT I WAS CHARGED WITH LAST FEBRUARY 26. SUBSEQUENT TO THAT DATE IT HAS ADMITTEDLY BEEN ESTABLISHED THAT THE CHARGE WAS IN ERROR. I KNOW THAT YOU CANNOT AGAIN TAKE ANY PRECIPITOUS ACTION WITHOUT CHECKING THIS ERROR.
>
> IF THERE ARE OTHER CHARGES I REQUEST THAT I IMMEDIATELY BE NOTIFIED, CONFRONTED, AND TRIED FOR THEM SO THAT THERE WILL BE NO DELAY IN MY OBTAINING UNION MEMBERSHIP AND A REGISTRATION ALONG WITH THE OTHER B REGISTERED MEN WHO HAVE QUALIFIED FOR SAME."

Again I waited nearly a month and received neither response nor acknowledgment. Again I found all doors closed to me in my quest for information. Consequently, on June 10, 1963, I sent duplicate copies of the following letter to Mr. Holtgrave and Mr. Kearny:

"1720 Buena Avenue
Berkeley 3, California
June 10, 1963

Mr. R. R. Holtgrave, Secretary
Joint Port Labor Relations Committee
c/o Pacific Maritime Association
16 California Street
San Francisco, California
and
Mr. James Kearny, Chairman
Joint Port Labor Relations Committee
c/o ILWU
400 North Point Street
San Francisco, California

Dear Sirs:

By this letter I am again attempting to avoid any possibility of a mistake being made in my case. Time and events may have blurred the facts.

On February 24 of this year I was called before the Union Investigating Committee as was proper since I had been cleared by your committee for A status. In that interview I was told I had an absolutely clear record except for the fact that I had chiseled some hours.

From documents produced at that time by T. Silas, I was told I was guilty of chiseling 13½ hours, or 3½ hours over the amount that would allow me to pass.

I was not allowed to prove my innocence before the committee. I was instructed that I could attempt to do so by going to the Record's Checker in the Joint Records Office at 400 North Point

Street, San Francisco, at any future date; and that if I was able to do this successfully that I would be notified to again come before the committee.

I appeared at the Records Office eleven hours later. (February 25, 9 a.m.). From his check of my records Mr. Silas presented me with dates on which I was said to have dropped six (6) hours and two and one-half (2½) hours. I proved that I had picked up these hours and he (Mr. Silas) stated that the committee would contact me by mail since I had been able to clear myself. I then requested the right to clear myself of the additional five (5) hours that would make the thirteen and one-half (13½) hours that I had been accused of dropping the previous night. Mr. Silas was unable to do this. The additional five hours did not exist.

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I requested the right to appear before the committee again that night. Mr. Silas stated I wouldn't be called until the following Monday.

I received via mail a notice to appear on Monday March 4, 1963 as he had promised. However, when I appeared I was told I was not to be heard, that my case was in the hands of the B Committee along with the other men whose status was doubtful, and that the Investigating Committee was holding no meetings after that night.

On March 8, 1963 I sent Mr. James Kearny a registered letter advising him of this situation and I requested that he as president of Local 10 intervene because I wanted 'The chance to clear

myself and correct the mistake' before the committee that incorrectly put the label of chiseler on my name. I got no answer.

Shortly thereafter it was made clear that the records of the men whose job futures were to be decided by the B Committee were to be checked back to June 1959, but it was stated that 'each men will have his day in court'.

Over two months passed and I sent the following wire to William Chester and John Trupp as co-chairmen of the joint B Labor Relations Committee:

> 'This is to avoid any possibility of a mistake. I have been informed by local union officials that your committee may still have me listed with the same LMO violations that I was charged with last February 26. Subsequent to that date it has admittedly been established that the charge was in error. I know that you cannot again take any precipitous action without checking this error. If there are other charges I request that I immediately be notified, confronted, and tried for them so that there will be no delay in my obtaining union membership and A registration along with the other B registered men who have qualified for same.'

Still I got no answer. This is very harrassing. There are rumors of other charges. Mr. Silas has stated to witnesses, Mr. R. Erkkila and others that the charges against me couldn't stand. The B Committee has held many meetings. The Investigating Committee has held meetings since March 4, 1963. Over 400 men have been passed by the committee.

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I have a family to support and keep secure. One side of that security has already been damaged due to the prolonged uncertainty of my future in the industry. I once again request union membership and A registration along with the other men who have qualified.

Very sincerely,
Stanley L. Weir 80524

CC: Harry Bridges"

The following day, June 11, 1963, I sent the following note to Mr. Paul St. Sure, President of PMA, and enclosed a copy of my letter of June 10, 1963 to Holtgrave and Kearny:

"1720 Buena Avenue
Berkeley 3, California

June 11, 1963

Mr. Paul St. Sure, President
Pacific Maritime Association
16 California Street
San Francisco, California

Dear Sir:

I am sending a copy of this letter to you at the suggestion of Paul Jacobs.

Sincerely,
Stanley L. Weir #80524"

I received neither response nor acknowledgment to any of these communications. What I did receive instead was the following unsigned letter, dated June 17, 1963, from the Longshore Labor Relations Committee of San Francisco:

"Stanley L. Weir, #80524

Dear Sir:

You are hereby notified that on the 17th day of June, 1963, at a meeting of the Joint Labor Relations Committee, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of #9 of the 'Memorandum of Rules Covering Registration and De-registration of Longshoremen in the Port of San Francisco'. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules.

In the event that the Joint Labor Relations Committee receives within fifteen (15) days after the date of this letter, a detailed written statement signed by you, satisfactorily demonstrating that there is no ground for your de-registration, and requesting a hearing, you will be given a hearing, at which you may show cause, if any you have, why such de-registration should be rescinded.

Pending such a hearing, or in the event no further action is taken by you, you are and have been de-registered as a Class B longshoreman as of the 17th day of June, 1963 and are not and will not further be entitled to the rights and privileges of such Class B registration.

Very truly yours,
Joint Labor Relations Committee"

The de-registration letter of June 17, 1963, which I have just quoted has certain salient features of importance in this litigation. Although reference to those matters may break the continuity of the recital

of events in this affidavit, I believe that they are of such importance as to justify the interruption.

1. The defendants have repeatedly told this Court that I and my fellow plaintiffs were de-registered pursuant to a certain set of standards purportedly enacted by the Joint Labor Relations Committee of San Francisco early in 1963. They have nowhere actually told this Court when such standards were enacted by the Joint Port Labor Relations Committee nor have they actually set forth the purported standards themselves. What the defendants have done is to annex to the affidavit of J. A. Robertson, verified March 15, 1965, a series of exhibits. One of these documents is entitled "Summary of Standards". The standards themselves are, curiously enough, not annexed. More curious still is the fact that in a previous affidavit of J. A. Robertson (verified October 2, 1964), he sets forth in quotation, at pages 8 and 9 of his affidavit, what purports to be the standards themselves. When compared with the purported summary, however, they are identical. This may well be so, i.e., the standards and the summary of the standards are identical, but certainly it opens a veritable Pandora's Box of questions, all of which lead to my second comment.

2. Whether there were such standards, what their genuine contents might actually be and whether they were really ever enacted by the Joint Port Labor Relations Committee is immaterial because the Joint Port Labor Relations Committee made it clear that we (I and my fellow plaintiffs) were being de-regis-

tered pursuant to other standards entirely. The Committee's letter of June 17, 1963, is quite specific. It states:

> "You are hereby notified that on the 17th day of June, 1963, at a meeting of the Joint Labor Relations Committee, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of #9 of the 'Memorandum of Rules Covering Registration and De-registration of Longshoremen in the Port of San Francisco'. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules."

But Section 9 of the 1958 Memorandum is quite specific. It nowhere lists as grounds for de-registration those alleged standards upon which the Joint Port Labor Relations Committee purported to make its judgments of de-registration. It reads:

> "Section 9. *De-registration of Limited Registration (Class B) Longshoremen.*
>
> (a) A Class B longshoreman may be de-registered in accordance with the provisions of Section 16(f) of the Basic Longshore Agreement and, in addition, he may be de-registered for cause by the Joint Labor Relations Committee (in accordance with such rules or uniform procedures as may be established or followed by such Committee) if the Committee finds:
>
> (i) The (sic) he has made any significant misstatement or misrepresentation in his application or interview.
>
> (ii) That he has failed, without leave of absence or excuse, to register at the Dispatch

Hall for a period of four consecutive weeks, such de-registration to be effective as of the beginning of such four week period.

(iii) That he has obtained and is engaged in other work or employment on a full time basis except with the approval or upon authorized leave of absence of the Joint Labor Relations Committee.

(iv) That over a period of three months or more he has had a poor work record as evidence by frequent failures to sign-in, flops or other facts indicating that he has not made himself available for full time dispatch through the Hall, except where he is on leave of absence for illness, disability or for other reason approved by the Joint Labor Relations Committee.

(v) That he has failed to make himself available for any work or shifts to which he may have been assigned by the Joint Labor Relations Committee.

(vi) That he is physically unable to do the work of a longshoreman, except where his disability has been incurred by industrial injury or disease occurring during the course of his employment as a longshoreman on the limited registration list.

(vii) That he fails to develop in respect to the abilities or knowledge requisite to the performance of longshore work and/or if he fails to participate in the longshore training program jointly established by the parties.

(viii) That he fails to participate where he is involved, in procedures established to provide

contract compliance, or that he has violated any other contract provision for which registered longshoremen may be penalized and fails to submit to discipline or penalty regularly provided in the case of registered longshoremen.

(ix) That he has been working in a manner which endangers the safety of other longshoremen.

(x) That he failed to take a physical examination as required by the Joint Port Labor Relations Committee or failed to submit the full report thereof to the Joint Port Labor Relations Committee.

(xi) Or for any other cause; provided that neither membership or nonmembership in the union nor activity or nonactivity for or against the union, shall be a factor in considering applications for registration or in de-registration.

(b) Either party, if it shall have information indicating that a Class B longshoreman is subject to de-registration for cause, may, at a regular meeting of the Joint Labor Relations Committee propose the de-registration of such Class B longshoreman and submit to the Committee any evidence in support thereof, if after consideration of the evidence submitted, the parties jointly concur in the proposal to de-register such Class B longshoreman, he shall be de-registered as of the last day on which he worked as a longshoreman; however, notice of such action taken shall be given by ordinary mail to the person so de-registered, and upon proper application in writing, having been made to the Joint Labor Relations

Committee by such person within fifteen (15) days after the mailing of such notice, said person so de-registered shall be given a hearing by said Joint Labor Relations Committee at which hearing he may submit evidence as to the facts considered by the Committee and others relevant to de-registration; in the event that the Joint Labor Relations Committee, after such hearing shall be satisfied that the person de-registered has shown that he was de-registered contrary to the rules, because of material mistake of fact or otherwise, and there was no ground for his de-registration, it may by unanimous vote rescind such de-registration; otherwise said de-registration shall be effective as of the date on which such de-registered person last worked as a longshoreman. Such notice of deregistration shall be by letter in substantially the following form:

Dear Sir:

You are hereby notified that on the ..... day of ....., 19....., at a regular meeting of the Joint Labor Relations Committee, by unanimous vote, you were de-registered for cause as a Class B longshoreman, pursuant to the provisions of Section 9 of the 'Memorandum of Rules Governing Registration and De-registration of longshoremen in the Port of San Francisco'. Such de-registration was based upon the determination of the Committee that you have violated the applicable rules, and particularly that you have (here give particulars) .

In the event that the Joint Labor Relations Committee receives within fifteen (15) days

after the date of this letter, a detailed written statement signed by you, satisfactorily demonstrating that the foregoing statement of facts is erroneous and that there is no ground for your de-registration, and requesting a hearing, you will be given a hearing, at which you may show cause, if any you have, why such de-registration should be rescinded.

Pending such a hearing or in the event no further action is taken by you, you are and have been de-registered as a Class B longshoreman as of the ..... day of ....., 19..... and are not and will not further be entitled to the rights and privileges of such Class B registration.

Very truly yours,
Joint Labor Relations Committee

By .....

By .....

(c) Limited registration (Class B) longshoremen may be de-registered if the Joint Labor Relations Committee determines the list is too long for the amount of work available. De-registration shall be from the bottom of the list after all men who have given cause for de-registration are dropped.

Joint Port Labor Relations Committee"

3. Moreover, there is still another aspect to all of this and an extremely important one at that. Section 9 sets forth the type of model letter which the Joint Port Labor Relations Committee was required to send to any Class "B" longshoreman whom it had

decided to de-register. The last sentence of that model letter requires that it include: "Such de-registration was based upon the determination of the Committee that you have violated the applicable rules, and particularly that you have (here give particulars) ."

The letter I received (as did all the other plaintiffs) is absolutely silent as to the particulars of the charges involved. That this represents a very grave violation of the duty of the defendants is, I submit, obvious. That omission when taken together with the matters I have already related in this affidavit and the further facts I shall hereinafter relate give a completely Kafkaesque quality to the entire proceedings and also give to the asserted protestations of the defendants of high-minded regularity and fairness, a very questionable character if not an absolutely incredible one.

I return to my recitation of events.

On June 21, 1963, after receiving the de-registration letter of June 17, 1963, I wrote the following letter which is self-explanatory:

"1720 Buena Avenue
Berkeley 3, California
June 21, 1963

San Francisco Joint Port Labor Relations Committee
Mr. R. R. Holtgrave, Secretary
c/o Pacific Maritime Association
16 California Street
San Francisco, California
and
Mr. James Kearny, Chairman
San Francisco, JPLRC
c/o ILWU Local 10
40 North Point Street
San Francisco, California

Dear Sirs:

I received your letter in which you de-registered me as of June 17, 1963. It does not inform me of any offense I may allegedly have committed.

Under provisions pursuant to #9 of the Memorandum of Rules covering Registration and De-registration I have had but one questioning of my record for which I was tried during my four years on the waterfront and I was cleared.

I request a hearing.

I request a written, detailed list of any charges you may have against me so that I can prepare for the hearing. I request that I immediately have my right to work restored so that I can support my family during this period.

Very sincerely yours,
Stanley L. Weir #80524

Copies to: Bridges, Bodine, and Thomas."

This letter finally elicited a response. It took the form of a letter dated July 5, 1963, from the Longshore Labor Relations Committee of San Francisco and reads as follows:

> "Your request for a hearing on your de-registration as A Class "B" longshoreman has been granted. This hearing will be held before a special meeting of the Joint Longshore Labor Relations Committee on JUL 11, 1963 at 2 P.M., upstairs at Pier 24, San Francisco. Any medical evidence or other documents to support your case should be submitted to the Committee at this time.
>
> Failure to appear at the time and place indicated will disqualify you from further consideration."

On July 7, 1963, after receiving this letter, I immediately sent a telegram to Mr. R. R. Holtgrave, the Secretary of the Joint Port Labor Relations Committee of San Francisco, reading as follows:

> "DEAR SIR. RECEIVED YOUR LETTER NOTIFYING ME I AM TO HAVE HEARING JULY 11TH I WILL BE PRESENT, BUT YOU HAVE NOT YET TOLD ME THE CHARGE YOU INTEND TO TRY ME FOR I AGAIN REQUEST YOU SO INFORM ME, AND NOT FORCE ME TO APPEAR WITHOUT PREPARATION SINCERELY"

Mr. Holtgrave's reply, likewise by telegram, requires no comment. It reads:

> "YOUR UNION IS YOUR EXCLUSIVE BARGAINING REPRESENTATIVE ON YOUR GRIEVANCE UNLESS YOU INTEND TO PROCEED INDEPENDENTLY WITH THE EMPLOYERS UNDER SECTION 9 OF THE NATIONAL LABOR RELATIONS ACT YOU SHOULD CONSULT WITH YOUR UNION REGARDING THE HEARING"

I immediately did as instructed. On July 9, 1963, I sent the following telegram to Mr. Kearny, President of Local No. 10 and Chairman of the Joint Port Labor Relations Committee of San Francisco:

> "R R HOLTGRAVE SECRETARY YOUR COMMITTEE NOTIFIED ME MY HEARING JULY 11. I WIRED HIM REQUESTING CHARGES. HE RETURNED WIRE THAT UNLESS I WANT TO DEAL WITH HIM UNDER SECTION 9 NATIONAL LABOR RELATIONS ACT THAT MY UNION IS MY REPRESENTATIVE AND I SHOULD CONSULT MY UNION ON THE CHARGE. I REQUEST YOU WIRE ME THE SPECIFIC CHARGES SO I CAN PREPARE DEFENSE."

By this time I was not astonished that I never received either acknowledgment or response.

On July 11, 1963, I appeared as directed before the Joint Port Labor Relations Committee. The session opened with my being told, (a) that I would not be permitted to have counsel, (b) that I would not be permitted to produce witnesses on my behalf, (c) that I would not be told the exact nature of the charges against me but only the general nature of the accusation, (d) that if I wanted to ascertain the precise nature of the charges which were *now* being leveled at me, it would be necessary for me to appear *entirely unaccompanied* (and this was stressed) at the Records' Office of the Committee within one week.

At the "hearing" itself, the union representatives made no offer to represent me, they did not even ask that the Committee be specific in its charges and absolutely gave me no assistance whatsoever. The union representatives were part of the prosecution.

At the "hearing" after being told the things that I set forth above, I was invited to make any statement I wanted. I spoke from written notes and said substantially the following: That I was glad I had the opportunity to speak to the Committee, that I was aware that more detailed attention had been directed toward me than toward any other Class "B" applicant for Class "A" registration because I had been unswerving in my defense of the rights and interests of the "B" men, because they had elected me their leader and spokesman, because I had been the representative elected by the "B" men to represent them before the Executive Committee of Local No. 10, and because, I had been outspoken in opposing the collective agreement as being unfair and completely unjust to the "B" men and, in the long run, towards the entire longshore working force, both "A" and "B", as well, and that I had, in consequence, earned the enmity of the officials of both the union and PMA; that this was not the first unfounded attempt to de-register me; that in April of 1963 the Committee had sent a de-registration letter to me ostensibly on the ground of a violation of the availability rule, but they had to back down and cancel the de-registration when I fought back and established conclusively that the charge was groundless; that this was another attempt to de-register me on groundless charges, just as it was an attempt to de-register other "B" men (the other plaintiffs in this action) on groundless charges, because we had earned the enmity of the leadership of the union and the employers for opposing the short-

sighted and ultimately self-defeating collective agreement; that I had also gained the hostility of the leadership of the union and the employers by protesting the 1960 freeze of promotions of "B" men to Class "A"; that other standards were being applied to me than to other applicants for promotion to "A" status; that those of the "B" men (even those who opposed the collective agreement and the freeze as unfair but were not outspoken about their objections) were checked for a base four-week period, but that those like myself who gave repeated voice to our objections were being investigated with a fine tooth comb for every day of our four years as longshoremen; that the maximum charges against me at one time was four hours, at another it was thirteen-and-one-half hours and still again at another eight-and-one-half hours, and in each instance I had shown them to be baseless charges; that having done so, having demonstrated the charges to be groundless, I was cited again to appear before the Investigating Committee but refused a hearing when I appeared; that I made repeated requests to be heard; that I was aware that the union had hired Asher Harer, the most experienced record checker available to them, to go over my records with a fine tooth comb (as well as the records of some thirty other Class "B" men) and that he had given me a clean bill of health, so to speak; that I was aware that a copy of Mr. Harer's report was in the possession of Mr. Kearny and that it showed that there was but one possible technical violation of this low-man-out rules against me in the entire four-year

period of any "B" registration and that was but for two-and-one-half hours; that I denied that even that two-and-one-half hours was correct and chargeable against me; that I was aware of the low-man-out rules since I was the "B" men's representative; that I was utterly opposed to chiseling of any sort and it was for that reason the "B" men elected me as their representative; that anyone who said I chiseled was a liar; and that I deserved my promotion but that if I did not get it I did not intend to quit and would fight the unjust decision to the bitter end.

During the course of my long statement to the Committee, I made reference to the report of Asher Harer, which I said was in Mr. Kearny's possession. Mr. Kearny interrupted to take out the report and read it to the Committee at that point and, indeed, it stated what I had claimed was in it. I then continued with my statement. When I finished my statement, there was a long silence. Finally, Mr. Holtgrave said, "Are you claiming discrimination by this Committee? Because if you are, the rules say that you can take an appeal within 10 days from today. Do you want to do that?" I told him that I was a bit amazed by his remark since I did not know what their decision would be and in the very beginning they had informed me that their decision would not come down for about two weeks. I concluded by saying specifically that I found their procedure baffling. I said, "How can I appeal within ten days from today from a decision which you tell me you will not reach for another two weeks?" Mr. Holtgrave did not reply but instead said

that if I wanted to I could go to the records checker's office on July 17, 1963, to learn the specific details of what the charges were against me. I said to Mr. Holtgrave, "My experience is very bad with that sort of thing because the last time I went to the records checker's office I never got back to the Committee. How, if I clear myself on the 17th, will I get back here?" Mr. Holtgrave said, "The chances are that you will not, but there will be a PMA man there on the 17th and you may go there if you like." With that remark, I was told the hearing was at an end and I should leave.

I appeared at the records checker's office on July 17, 1963, and this time I was accused of 22½ hours of low-man-out violations on specific dates. I got out my own records which I had with me and tried to show them that each of the alleged violations were groundless. They refused to look at my records. I asked them to produce the sign-in sheets so that I could substantiate my statement that I was not guilty of any of the violations of which I was being accused. This, too, they refused to do. Mr. Edwards of PMA in effect said to me that they were standing on their accusations and that that was the end of the matter. The next day I wrote the following letter which is self-explanatory:

"1720 Buena Avenue
Berkeley 3, California
July 18, 1963

Mr. R. R. Holtgrave, Secretary
Joint Labor Relations Committee
c/o Pacific Maritime Association
16 California Street
San Francisco, California
and
Mr. James Kearny, Chairman
Joint Labor Relations Committee
c/o ILWU
400 North Point Street
San Francisco, California

Dear Sirs:

Your committee de-registered me as a class B longshoreman on June 17, 1963 thus discharging me from my job. At that time you did not supply me with the reasons for your action.

Because I appealed, you sent me a letter dated July 5, 1963 telling me I had been granted a "hearing" on July 11, 1963. Prior to the latter date I telegrammed both of you requesting the charges I was to be tried for. I did not receive the answer I requested.

At the July 11 "hearing" I was not supplied with the specific nature of the charges. I was simply told that I had violated the LMO rules by dropping 23½ hours. Neither of the two lawyers present for the PMA nor the union's four man B committee that had accused me supplied the specifics of the charges. No master sheets, sign in sheets, or (with one exception), dispatch sheets were produced to substantiate the charges.

When I objected I was informed by your secretary that I could learn the exact nature of the charges that I was being tried for on that day (July 11, 1963) on July 17, 1963 at the Records Office.

When I arrived at this 'closed door' confrontation at the Records Office to learn of and discuss these charges there was present Mr. Edwards of the PMA, Mr. Rizer, the records checker, Mr. Hoffman of the B committee Mr. Hunter, the sargent at arms and for part of the time looking on was Mr. Silas. I was presented with charges that now totaled 22½ hours.

Was I being tried by these men instead of your committee of authority? Did they have the power to clear me or find me innocent? I was not told that my hearing was to be continued at the records office or that any but your committee had jurisdiction.

In view of the above I request a real hearing in front of your committee.

(Again I point out that I should not be tried for more than the hours I allegedly dropped on the basis of the first four week check. The amount was less than 10 hours. The men who were given A registration and not de-registered were not checked for more than four weeks if the amount was less than 10 hours. I was checked for at least sixteen (16) weeks. I met the standards by which over four hundred men were promoted to union membership and given A status. Among those correctly promoted were men found guilty of LMO violations. Their sentence was 30 days off as the contract stipulates. I, who have never been tried, have already had over 30 days off.)

I request that all the charges be backed by all the relative documents from the records office needed to substantiate them.

Only in such a hearing can I for the first time have the opportunity to make my defense. In addition to simple adherence to democratic procedure I add that the extreme complexity of the LMO system makes this doubly true. I seem to recall that at the July 11 'hearing' I was told I would not be allowed to produce witnesses. In the light of the fact that my four prosecutors of the union's B committee were present as were two PMA lawyers from PMA who participated and from whom your secretary received counsel in the 'hearing', am I to be denied witnesses and counsel in my behalf?

Sincerely,
Stanley L. Weir #80524"

Parenthetically, just in the event I have not yet made it clear, I hereby deny that I was guilty of any of the violations which were specifically charged against me at the records office on July 17, 1963.

The next event which occurred was that I received a letter on the stationery of the Longshore Labor Relations Committee of San Francisco, which reads as follows:

"July 23, 1963

Stanley L. Weir

Dear Sir:

This letter will advise you that the Longshore Labor Relations Committee has considered your appeal on de-registration which was heard at the meeting of July 11, 1963.

After a thorough investigation and review of the facts in your case, the Committee has decided that these facts are such that the application of the rules agreed to between the parties to these facts requires your deregistration. Accordingly, its decision is to reaffirm the determination made on June 17, 1963 that you are deregistered.

Very truly yours,
R. R. Holtgrave
Secretary"

On July 27, 1963, I took an appeal and in doing so wrote a letter which reads as follows:

"July 27, 1965

R. R. Holtgrave, Secretary
James Kearny, Chairman
JLRC (PMA-ILWU)
16 California Street
San Francisco, California

Dear Sirs:

Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.

I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination.

I have never been able to get from you an official statement specifying the alleged charges against me, nor did your committee produce documents to substantiate the charges.

Would you please correct this situation for the next hearing."

Substantially, all of the other plaintiffs wrote identical letters of appeal on that date. All of the plaintiffs, including myself, waited patiently hoping that our appeals would be called for a hearing. After waiting eight-and-three-quarter months without acknowledgment or response or any other action whatsoever by the defendants, the other plaintiffs and I commenced this action. Before this action was commenced, however, I tried to find out if the Committee and the defendants intended to act on the appeals and when that would be. I telephoned for information and was informed that the matter was closed. The decision of July 23, 1963, I was informed, was final. It was then that this action was actually commenced.

Before going on to discuss the evidence upon which I ask this Court to conclude that the defendants acted against me (and the other plaintiffs) with hostility, in bad faith and with open malice, I believe it apposite to bring to the attention of this Court the fact that there have been at least three separate, protracted, plenary hearings in collateral proceedings dealing with the underlying events and that *in each of those hearings the factual conclusions arrived at independently by the respective impartial hearing officers either have been sharply at variance with or totally contradictory of the arguments, assertions, conclusions and contentions of the defendants as they have been presented to this Court in this litigation.* This has been true, first, in the hearings before the California Unemployment Insurance Appeals Board where nearly 1,700 pages of testimony were elicited and

scores of exhibits scrutinized in a bitterly contested proceeding and, secondly, in the protracted hearings before a Trial Examiner of the National Labor Relations Board, in a relevant allied proceeding, where again extensive testimony was heard and large numbers of documentary exhibits were considered. For the information of this Court, I hereby annex hereto, make part hereof and mark as Exhibits, photostatic copies of the following:

Exhibit "C"—Decision of Donald Gilson, as Referee, dated May 14, 1964, for the California Unemployment Insurance Appeals Board in proceedings entitled, "In the Matter of James V. Carter, et al.", Case No. SF-3033. I am one of the claimants in these proceedings.

Exhibit "D"—Decision of Albert E. Gatley, as Referee, dated August 16, 1963, for the California Unemployment Insurance Appeals Board in proceedings entitled, "In the Matter of Roger W. Fleeton," Case No. OAK-4519.

Exhibit "E"—Decision of the California Unemployment Insurance Appeals Board, dated February 14, 1964, in an appellate decision entitled, "Roger W. Fleeton, Claimant-Respondent, vs. Pacific Maritime Association, Employer-Appellant", Benefit Decision No. 63-3167.

Exhibit "F"—Decision of Herman Marx, as Trial Examiner, for National Labor Relations Board, dated May 4, 1965, in consolidated proceedings entitled, "Pacific Maritime Association and Johnson Lee, et

al." (Case Nos. 20-CA-2787 etc.) and "International Longshoremen's and Warehousemen's Union, Local No. 10 and Johnson Lee, et al." (Case Nos. 20-CB-1121 etc.).

It would serve no useful purpose to summarize the foregoing exhibits in detail in this affidavit, but it is important, however, to point to certain salient aspects of those decisions.

First: In the proceedings before the California Unemployment Insurance Appeals Board involving as claimants many, if not most, of the plaintiffs in this action (among whom I am one) (*In the Matter of James V. Carter, et al.,* Case No. SF-3033) the decision of the Referee (Donald Gilson), dated May 14, 1964, (Exhibit "C") which was reached, as I have already observed, after considering testimony covering nearly 1,700 pages of transcript, including several hundred pages of testimony by representatives of the defendants, stated:

> "The questions presented are two in number and are mutually exclusive. First, if the claimants herein voluntarily left their work, did they do so without good cause? Secondly, if the within claimants were discharged by their employer, was such discharge for misconduct?" (p. 10)

It is important to observe the conclusions arrived at by the Referee with respect to these two questions. In dealing with the first he concluded:

> "In order to evaluate the circumstances in the instant cases with the cited cases, it is necessary to review briefly the circumstances in which the

claimants are found. They had worked since 1959 as longshoremen and, as such, were subject to the rules and regulations that have been hereinabove set forth. In this capacity they were obliged to pay a *pro rata* cost of the hiring hall, which they all did, even though at times they were late with such payments. It is worthy of comment, however, that as of the date that consideration was given to them for reclassification as Class A longshoremen, they were all in a current condition in respect to their *pro rata* payments. In each such instance the individuals had paid the $1 per day fine,* which was established for tardy payments and in each such instance, the man continued fully eligible to be dispatched to work as a Class B longshoreman and was in fact dispatched as such over the years involved.

"Similarly, some of the claimants herein had been subjected to penalties in connection with violations of the 'low-man-out' rule. It is true that errors had occurred in respect to the hours used by some of the claimants herein. Such errors had occurred in some cases *because of a rule adopted by the dispatcher* in connection with Sundays and, in other cases, it was *because lack of*

*The $1.00 per day fine imposed for late payment of *pro rata* was an exaction imposed unilaterally by the union. It seems not to have been imposed pursuant to any provision of the collective bargaining agreement. It together with the *pro rata* was paid into the union treasury from which undisclosed sums were used to defray the union's portion of the cost of maintaining the hiring hall. In the decision of the Trial Examiner for the NLRB, referred to above, he found: "The San Francisco Port Committee fixed the 'pro rata share' payable by Class B Registrants, charging $8 per month since some point in March 1963, and $6 per month prior thereto. These payments are made by the registrants directly to Local 10, which levies and collects a fine of $1 for each day a B registrant is in arrears." (Decision, p. 5:1-6)

> *knowledge and understanding of the rules and confusion in the minds of the claimants* as to the proper hours to be used. In each such instance the claimants had been continued in employment until the decisive action of the Joint Port Labor Relations Committee which is the subject matter of the instant case.
>
> * * * * * * *
>
> "After analyzing all the facts, *it is inherently impossible to believe that the claimants herein could logically have been expected to anticipate that their acts would result in the loss of their employment. In brief, the claimants did not embark on a course of action which they knew or should have known would result in the loss of their employment. As a matter of fact, over the years a pattern of behavior was established which was condoned and allowed by the employer, the union and the Joint Port Labor Relations Committee."* (pages 12-13)—(Italics added.)

Even more pertinent are the conclusions of the Referee with respect to the second issue, namely, "whether or not such discharge was for misconduct." In reaching his conclusions on this issue the Referee stated that the standard which he employed in determining the issue was whether the claimants had been discharged "because of a material breach of duty owed the employer under the contract of employment which breach tends to injure substantially the employer's interest." His conclusions read in part:

> "A careful analysis of the facts shows that during the period of the claimants' employment from 1959 to June 17, 1963, they were retained as

registered Class B longshoremen and as such were dispatched to such employment as became available through the hiring facilities of the jointly operated hiring hall. During this period of employment, as has been indicated hereinabove, all the claimants became involved to a more or less extent with one or more of the stated violations of the rules adopted for their conduct. Again, emphasis must be placed upon the fact that violations in respect to the working rules or in respect to availability were considered at the time of occurrence and penalties were assessed. Those penalties being satisfied, the individuals were continued as Class B longshoremen and were dispatched to employment as it arose. *If* the Joint Port Labor Relations Committee was harmed in any way or *if* the companies for whom the services were performed through the facilities of the Joint Port Labor Relations Committee were jeopardized, *such acts against the employer's interest were condoned and abrogated* by the imposition of the penalty and the satisfaction thereof.

"In connection with the violations of the *pro rata* payment and the 'low-man-out' rule, it is especially noteworthy that the principal party to be aggrieved by such violations was the International Longshore and Warehousemen's Union, inasmuch as such violations affected the financial operation of the hiring hall and also was of a nature whereby the so-called 'chiseling' of the claimants was to the detriment of the members of the union. Yet, despite these acts which would jeopardize the union organization rather than the employer organization or the Joint Port Labor Relations Committee, the ILWU at the meeting

of the Joint Port Labor Relations Committee, on July 16, 1963, moved that individuals involved in the LMO violations and *pro rata* payment violations be *re*registered and moved to Class A registration. *This would indicate that the principal party which would be aggrieved by the acts of the claimants was not in fact aggrieved* and that the grievance was not of a nature which would preclude the union desiring such individuals to be promoted to the higher classification and accepted into membership.*

"When these circumstances are considered along with the fact that violations of the LMO program *would* in no way jeopardize the functions of the Joint Port Labor Relations Committee and that said Joint Port Labor Relations Committee had previously *condoned* the other violations that are involved herein, it is concluded that there is serious doubt that the acts of the claimants constitute misconduct. . . .

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*It may well be noted that the motion referred to was made in response to two motions which were "overwhelmingly adopted" at a membership meeting of Local 10 on July 11, 1963, which read as follows:

"M/S/C THAT ALL 'B' MEN WHO ARE ON APPEAL AND WHO HAVE NOT BEEN PROMOTED SOLELY BECAUSE OF LOW-MAN-OUT VIOLATIONS SHALL BE GIVEN 30 DAYS OFF AS PER CONTRACT AND PROMOTED TO 'A' REGISTRATION.

"M/S/C THAT THE LABOR RELATIONS COMMITTEE BE INSTRUCTED THAT ALL 'B' MEN WHO ARE ON APPEAL AND HAVE NOT BEEN PROMOTED SOLELY BECAUSE OF PRO-RATA VIOLATIONS SHALL BE RE-REGISTERED AND MOVED TO 'A' REGISTRATION." (Local 10 Longshore Bulletin, July 19, 1963.)

Two things are most significant here: the membership, who in the ultimate analysis, constitute the "aggrieved" party did not consider themselves so and, moreover, they "overwhelmingly" recognized the deregistrations of the B men to be contrary to the contract.

". . . . The circumstances herein are such, and the evidence serves to establish, that the claimants desired to continue working and that they had no reason to believe that violations occurring over a period of three or four years, for which proper penalty had in each instance been made, would result in the loss of their employment. *Their acts were not of a nature to be wilful or indicative of intentional disregard of the interests of the Joint Port Labor Relations Committee. . . . A discharge under such circumstances is not for misconduct. . . .*" (Pages 13-14; italics added.)

Secondly, in the separate proceedings before the California Unemployment Insurance Appeals Board involving Roger W. Fleeton (Case No. OAK-4519), (Exhibit "D") one of the plaintiffs in this action, the Referee (Albert E. Gatley) concluded:

"The claimant herein was terminated from his employment by the action of a joint labor relations committee made up of members of his unions* and employers. He has testified under oath he was advised by the union dispatcher that he was not required to be available for dispatch on Sunday and that it was customary of longshoremen in his category not to be available on Sundays. It was further the custom of individuals in this category not to report penalty hours in the event that they missed employment opportunities on Sundays. *The employer was unable to present any evidence that would contradict this testimony.* The claimant's alleged violations of the registra-

*This is an error. The claimant was not a member of the union. The Committee was made up of representatives of PMA and Local 10.

tion rules were committed months in advance of any action taken by his union or the Joint Relations Labor Board. Although the employer is a party to the agreement which established the dispatch rules, the claimant's discharge was instigated by the union and the distribution of work program was for the benefit of the union members. In the opinion of the referee *the evidence does not substantiate a finding that the claimant violated an obligation owed to the employer and further, it could not be said that the claimant's actions were wilful so as to constitute misconduct. . . .*" (Page 3; italics added.)

PMA appealed this decision to the Board. On February 14, 1964, the Board affirmed the Referee's decision and in doing so wrote:

"The claimant testified that he and others of the group of Class B longshoremen had been informed by a union official that it was not necessary that they register or be available for work on Sundays because of the slight chance that Class B men would obtain Sunday employment, and that the matter would be taken up with the Pacific Maritime Association to confirm the action. The dispatchers were not charging Class B men with hours of work on Sunday but were leaving the registration sheet blank. The violation of which the claimant was accused was that he had work opportunities in April and in August 1962, on Sundays, and did not report the 'flops' or reregister the following Monday, as is required by the rules. The claimant further testified that such procedure was common practice among all of the Class B longshoremen. . . .

"The witness for the employer was unable to state whether this practice was a standard practice. . . ." (Page 8; italics added.)

The Board, in unanimously affirming the Referee's decision, concluded:

". . . the express intention of violating the rules . . . is absent in the matter presently before us. In the present case the claimant had been informed by the dispatcher, a union member, that it was unnecessary for Class B members to register and hold themselves available for work on Sundays because of the slight chance that they would be called. It appears as if it was standard practice for Class B members to absent themselves on Sundays without incurring a penalty. While the published rules are specific about the necessity of observing the rules strictly, it is our opinion that the claimant was entitled to rely on information given to him and to others in his situation, from one in authority. We hold, therefore, that the claimant did not intentionally violate the rules of the Joint Labor Relations Committee. . . ." (Page 10.)

Thirdly, there were extensive hearings before a Trial Examiner of the National Labor Relations Board (Exhibit "F") involving five Class B longshoremen who were deregistered together with these plaintiffs on June 17, 1963, and upon allegedly substantially identical grounds (Case Nos. 20-CA-2787; 20-CA-2788; 20-CA-2796; 20-CA-2796-2; 20-CA-2796-3; 20-CB-1121; 20-CB-1122; 20-CB-1124; 20-CB-1124-2;

20-CB-1124-3). In effect the Trial Examiner found that the alleged grounds upon which the defendants ostensibly predicated deregistration of the Class B longshoremen there involved were without substance and recommended, among other things, their reinstatement with back pay and interest. In its salient aspects that decision is extremely pertinent here. A copy of the decision is before this Court as an exhibit. Its length precludes summarization. However, I stress its importance on this motion because of its detailed recital of the underlying facts involved, its careful analysis and evaluation as to the weight, credibility and implications of the testimony adduced and its overall conclusions. I venture the opinion that if this decision, together with the decisions rendered after the unemployment insurance compensation hearings, are placed on one side and the factual allegations of the defendants in this litigation are placed on the other, the conclusion will be inescapable that there is something less than good faith in the self-righteous presentations and protestations of the defendants in this litigation.

I have charged that the defendants discriminated against me from motives which were malicious; that they did so with overt hostility; and that the defendant unions, with the aid and assistance of PMA denied me entirely fair representation.

These statements are, of course, in part, conclusions. To a certain extent I have already set forth the factual basis upon which these conclusions rest. I now propose to deal with certain of the facts which will

"round out the picture," so to speak, and demonstrate fully the motivations involved.

I was, as those already pointed out, registered as a Class "B" longshoreman on June 1, 1959. This date is important because it comes during a period which marks the end of certain tentative negotiations which were being conducted between PMA and ILWU—negotiations which had been under way for several years and which were soon to conclude in an intermediate stage: the execution on August 30, 1959, of a certain collective agreement effective for a three (3) year period commencing retroactively on June 15, 1959, and ending on June 15, 1962, with provisions for certain further negotiations annually during the three year term. Because of the importance of this agreement to the remarks which I shall hereinafter make, I annex a copy thereof as Exhibit "G". I shall discuss it more fully hereinafter, suffice it now to note that I was outspoken in my opposition to this agreement because of its immediately injurious effects on the working conditions of the Class "B" men and, over the long run, to the detriment of the Class "A" men as well. I shall return to this subject hereinafter.

The original category of registered longshoremen came into existence as a consequence of the bitter waterfront strike of 1934 on the Pacific Coast. It was terminated with a collective agreement but only after it riveted the attention of the entire nation upon it and, likewise, only after it invoked Presidential intervention. It represented one of the high points of labor militancy in this country. The settlement which came

out of it provided, among other things, for the registration of the permanent longshore work force. Registration had a twofold aim: it sought to satisfy the needs of the employers by making available a stabilized labor force while simultaneously affording longshoremen regularity and continuity of employment.

During the next dozen years or so the waterfront on the Pacific Coast remained a place of troubled peace. The period was marked by a host of major strikes of almost equal bitterness and by an almost countless number of sporadic and local strikes.

The last of the major disruptive strikes occurred in 1948 and lasted for 95 days. It was following the settlement of that strike that a new spirit of accommodation gradually was achieved. Several factors combined to make that result possible. First, there was a change in the leadership of the employer group. This was a necessary condition for the purpose of better accommodation, but not a fully sufficient one. Two other conditions were far more significant: (1) There were the beginnings of mechanization applied to the loading and unloading of cargo and the recognition that the trend toward the use of labor saving devices was not a trend capable of being stopped in its tracks. Longshore union militancy could disrupt and obstruct but it could not permanently halt the trend. The trend proved the threat of a future decreasing need of as large a longshore working force as had prevailed in the past. ILWU and the registered longshoremen were extremely cognizant of this factor and seemingly tempered their activities accordingly.

(2) From the point of view not only of ILWU and the registered longshoremen, but also from the standpoint of PMA, there was beginning to be a very discernible drop in the number of registered longshoremen, a drop in the availability in the experienced longshore labor force, which was the consequence of normal attrition in any closed category: their deaths, there were injuries and retirements, there were transfers to other occupational pursuits and other related factors at work all of which served to decrease the number of registered longshoremen regularly available.

There was yet another factor involved which was even more crucial than all of the foregoing: the average age of the registered longshoremen had and was continuing to increase. This left them less and less able to do the arduous work which—in spite of all the mechanization conceivable—still remained an absolute necessity in very large areas of longshoring.

By the mid-1950's, these factors were, not only recognized but openly discussed by all interested parties. Toward the end of 1957, conversations of an exploratory nature had begun between PMA and ILWU looking toward possible solutions for the problems these factors posed. For PMA the great aim, of course, was the elimination of all, or substantially all, of the restrictive practices which were embodied in the then existing collective agreement and which had been attained by ILWU over the years from 1934 on. To a certain extent those restrictive practices involved what Harry Bridges termed the forced

use of "witnesses:" longshoremen who were totally unnecessary for the accomplishment of the tasks involved. But, this was but a part, and perhaps not the chief part, of the restrictive practices which PMA sought to end. It sought a free hand in its operations: it wanted to be the sole judge of what was proper in its utilization of its labor force. PMA members did not as a consequence of the collective agreement which was subsequently entered in for the first time begin to mechanize. It had been doing it right along. What it wanted was to be able to determine for itself what the minimum labor it required to man its equipment and not the optimum number or the number the unions had attained as the minimum in prior collective agreements.

ILWU, for its part, faced the problem of how eventually to protect the Class "A" longshoremen who were more and more coming to an age at which they were necessarily required to retire or physically incapable of doing demanding tasks. There was recognition, too, that inevitably the restrictive work practice rules would to some extent have to be given up. For both PMA and ILWU, there was additionally the necessity of having a replacement body of longshoremen who would be available to do the more arduous work which still remained, which continues to remain in abundance and with respect to which mechanical devices are either no substitute or even useful adjunct. Such supplementary body of longshoremen were, of course, also necessary as replacements for the natural losses incurred in the closed

category of registered longshoremen. Tentative feelers between the parties in the mid-1950's indicated a desire on both sides to compromise the differences between them. Certain exploratory approaches were therefore made. In 1957, the parties opened practically the entire field of longshore protective provisions for negotiation. This was done following a union caucus consisting of delegates elected by locals to determine policy, which met in October of that year.

Subsequent to that union caucus, ILWU submitted a memorandum to PMA on November 19, 1957 in which ILWU proposed more formal negotiations and listed the following as mutual objectives to be explored:

> "1. To extend and broaden the scope of cargo traffic moving through West Coast ports and to revitalize the lagging volume of existing types of cargo by:
>
> (a) encouraging employers to develop new methods of operation; (b) accelerating existing processes of cargo handling; and (c) reducing cargo-handling costs in water transportation, including faster ship turn-around.
>
> "2. To preserve the presently registered force of longshoremen as the basic force of the industry and to share with that force a portion of the net labor cost saving to be effected by the introduction of mechanical innovations, removal of contractual restrictions, or any other means."

In other words, to explore the possibility of giving to members of PMA as complete freedom for the

manner, mode and nature of their operations as they had practically enjoyed prior to 1934 at the expense of longshoremen not of the Class "A" category.

These negotiations had certain concrete results. One of the first and, of course, one of the most important of them so far as this litigation is concerned is the fact that on March 18, 1958, the Joint Port Labor Relations Committee in the Port of San Francisco adopted the 1958 Memorandum whose purpose, among others, was to set the machinery going for registration soon thereafter of a large group of Class "B" longshoremen. The plaintiffs were that group of Class "B" longshoremen.

The second result was involved with our induction as Class "B" longshoremen in the middle of 1959. With our induction the groundwork was laid (a) for relieving the Class "A" men of the duty of doing taxing, difficult and back breaking work—that work was now, in practice, exclusively for the Class "B" men, who under the rules could not refuse to take such assignment—and (b) for eliminating, in practice, substantially all of the protective rules embodied in previous collective bargaining agreements because practically speaking, now the only ones injured by the elimination of such protective work rules were the "B" men with whose protests neither the leadership of the union nor the employers were concerned. The collective agreement of August 10, 1959 (Exhibit "G") followed soon thereafter.

It is of interest in this connection to note that in August of 1959, at or about the time the new agree-

ment was entered into, PMA (with the cooperation of ILWU) hired Max D. Kossoris of the Bureau of Labor Statistics to make various studies for it. Subsequently, in January of 1961, Mr. Kossoris published an article in the Monthly Labor Review entitled "Working Rules in West Coast Longshoring" in which some very pertinent comments were made. He wrote at page 4:

> "To make some progress in the desired direction, the PMA and the ILWU entered into the remarkable agreement of 1959. For a payment of $1½ million, the union agreed to go along with any and all mechanization during the 1959-60 contract year; but all restrictive rules were to remain in full effect. The 1958 fully registered work force was to be maintained, subject only to natural attrition—i.e., deaths, retirements, and dropouts. The employers, in addition to the right to mechanize without fear of reprisal by the union, bought a year's time during which to develop a measurement system accurately determining the man-hours saved.
>
> "This was the initial step. The ultimate objective was stated to be:
>
> "To guarantee the fully registered work force a share in the savings effected by laborsaving machinery, changed methods of operation, or changes in working rules and contract restrictions resulting in reduced manpower or man-hours with the same or greater productivity for an operation.
>
> "This objective went far belond mechanization. It included—on the basis of the cited language—*any* change that resulted in greater productivity,

> regardless of how it was brought about. The union clearly recognized that restrictive working rules were part of that picture. The agreement also was silent on what the union was to get as its share of the savings. This was to be left to later negotiations when the measurements would indicate the size of such savings. Then the parties would know what they were bargaining about."

Mr. Kossoris acknowledged the entirely one sided nature of the 1959 agreement: its purpose was "to guarantee the fully registered work force . . ." but of benefits to the other members of the collective bargaining unit—the Class "B" men—there were none.

Mr. Kossoris tells us certain other revealing information:

> "During the first bargaining session on May 17, 1960, the ILWU's negotiators were surprised to learn that the employers were no longer interested in the sharing of gains. Instead, the employers' position was: How much will it cost us to get rid of the restrictive rules and to get a free hand in the running of our business?"

Mr. Kossoris thereafter tells us:

> "Behind this shift in the employers' position was a significant and interesting change in thinking. During the preceding 2 years, the '"sharing of gains"' concept was generally accepted, although with at least one important defection. It seemed a reasonable and equitable way out of the bind of restrictive rules, and it promised far-reaching benefits. But early in 1960, the men

running some of the larger steamship companies reversed their thinking. To permit the union to share in gains was considered an invasion of management's prerogatives and consequently was completely unacceptable. Management decided to ' "buy out" ' the restrictive practices and labor's opposition to mechanization. The problem was the price.

"The employer and union negotiators proceeded from very different starting points. In exchange for a free hand, management offered a guaranteed wage that would protect the longshoremen against lost work opportunity. To the union, this was completely unacceptable. Conceivably, cargo might increase in volume so that no longshoremen would lose work; and then the union would get nothing for giving up its restrictive rules. The union's position was: We'll give up our rules, for a price; but we set a high value on our rules because we think the companies will gain millions of dollars.

"Subsequent negotiations—which stretched out until the ground rules of the 1960 agreement were settled on October 18, 1960—revolved around the questions of how much and what for."

All of these negotiations culminated in a series of agreements and understandings between PMA and ILWU the net practical effect of which is that for a price of $29,000,000 the employers—PMA—bought all of the protective devices which had been developed over the years since 1934 for the protection of the longshoremen with all of the benefits running to one category of the collective bargaining unit only—the

Class "A" men so registered as of August 10, 1959. All of the detriments were at the cost of the remainder of the members of the collective bargaining unit—the Class "B" men. And even to the extent that some provision remained for the protection of the "B" men in theory it became illusory in practice because the collective agreement provided that a strike in protest against various conditions by the union would serve to reduce the $29,000,000 fund at the rate of $13,650 per day. Since the then registered Class "A" men would be penalized by such action, it took from them and from the leadership of ILWU any incentive to really protect the Class "B" men from whatever conditions the employers now imposed upon them.

The foregoing represents one aspect of the background events upon which, when taken in connection with certain other facts to be set forth hereinafter, I shall ask this Court to conclude that there has been bad faith, malice and hostility toward me by both PMA and ILWU. However, there is another background phase, likewise, necessary for such understanding. I turn to that matter now.

Within a few days after our induction as Class "B" longshoremen a special meeting of all Class "B" men was called. Attendance was compulsory. We were addressed by officers of Local No. 10 who first informed us that we were to be governed by the 1958 Memorandum and the Low-Man-Out Rules and, secondly, they represented to us that within six months to one year all of us would be moved into Class "A" status. Mr. Chester, the International Representative

to Local No. 10, in his address dealing with this subject represented to us that this was a firm understanding and that we could count on it.

At first it seemed that that understanding was to be kept. Early in 1960 some 163 Class "B" men were approved for transfer to Class "A" and we were informed that the resolution pursuant to which this was to be done provided for further transfers at the rate of not less than 15 Class "B" men per month thereafter to make up for the natural attrition in the Class "A" category. Before any transfers were made, however, the 1960 contract negotiations came along and all Class "B" men were frozen, including the 163 Class "B" men who had already been approved.

These two factors: The detrimental effect on the "B" category and the freeze on promotions led to much discontent among the entire "B" group. I was, perhaps, the "B" man most outspoken in my condemnation and disapproval although the feeling was quite general throughout the "B" ranks. The dissent continued to grow. The consequence was that Local No. 10 invited the Class "B" men to elect three of their ranks as representatives to the Local No. 10's Executive Board. They hoped that thereby some of the considerable discontent might be abated. I, being one of the most outspoken of the "B" men, was elected one of the three representatives to the Executive Board.

We actually attended but few sessions of the Executive Board. At the very first session we attended Thomas Silas and Carl Smith moved to exclude us

except for those items on the agenda dealing specifically with "B" men. The next session we were again met with hostility and abuse and again Carl Smith and Thomas Silas attempted to have us excluded. In the third and last session we attended we fared no better. William Chester moved to exclude us and this was done.

During that period it was made clear to us and especially by Thomas Silas that our opposition to the agreement and our opposition to the freeze on the "B" men's status had made of us and our following among the "B" men *persona non grata* to the leadership of the union and to the employers. Silas bluntly told us that we as representatives of the "B" men were being watched continuously and that we would be deregistered at the first opportunity that presented itself. That his threat was well founded was shortly thereafter confirmed when the other two Class "B" representatives were deregistered. I alone survived and at one time I was even told by Albert Bertani, an official of Local No. 10, that, "If they don't get you one way, they will another." I was, in short, a marked man and to a lesser extent were those who supported me most strongly among whom are most of the plaintiffs.

Among other typical incidents I can relate which bear upon my allegation of hostility, malice and bad faith is one which is quite clear. In the autumn of 1961 Harvey Swados published an article in Dissent entitled "The West Coast Waterfront". That article in the main argued the objections I had frequently

maintained in opposition to the contract and the exploitation of the "B" men. I had two copies of the article and from time to time I lent one of them to various longshoremen to read. (For the information of this Court a photostatic copy of that article is hereto annexed, made part hereof and marked Exhibit "H"). Subsequently, in the office of James Kearny and in the presence of Albert Bertani, Pat Tobin, a close friend of Harry Bridges, said to me that I could expect to be a victim sooner or later because I hadn't acted wisely. I said to him, "What have I done to bring on Harry Bridges' wrath?" He told me that I had been observed lending copies of the article to Class "B" men. I said, "Isn't it my right to do that if I please?" He replied, "Yes, but it wasn't smart to do it." Then he repeated, "if you had been smart you certainly wouldn't have done it." Later on in the conversation he also said, in substance, that I had not been wise in being too outspoken in opposition to the contract and implied that I would pay a price for it.

I respectfully submit that I have shown that my charges of bad faith, malice and hostility are predicated upon a sound factual showing. I have demonstrated among other things that my position of leadership and opposition among the "B" men earned me the animosity of both the leadership of the union and PMA because both had equal stakes in the agreement and its discriminating features directed against the "B" men. Most of the plaintiffs were my firm supporters and they too thereby became the victims of hostility, malice and bad faith. All of us have been

victimized because we antagonized the existing bureaucrats of ILWU, Local No. 10 and PMA, although in Local No. 10 there were some officials who were men of integrity and who told me they hated to be part of the frame up against me but that they were powerless to interfere. All of the plaintiffs have just cause for complaint in this litigation.

There is an additional matter that I desire to mention in this affidavit: the hostile discrimination as it manifested itself in disparity of treatment. This took on a variety of forms. Perhaps the most immediately important one is involved with the fact that during the processing of the "B" men for transfer to the "A" status prior to our deregistration on June 17, 1963, we were not judged by equal standards: invidious discrimination was involved. However, the evidence of this is in the possession of the defendants, and although I know the evidence exists, and where it is to be found, I shall not be able to do so until the trial of this action, because its disclosure awaits the employment of discovery, inspection and deposition proceedings.

There are, however, two aspects of disparity of treatment that I can point to immediately.

(1) J. A. Robertson, Secretary of PMA, in his affidavit submitted to this Court, verified October 2, 1964, stated that among the rules adopted was the following:

> "1. Any class 'B' longshoreman found to have 10 or more hours of Low Man Out violations shall

be considered eneligible for advancement to Class 'A' registration,"

and, therefore, was required to be deregistered (p. 8).

I quote the following from the Local No. 10 Longshore Bulletin and I submit that comment is unnecessary:

"LOW-MAN-OUT VIOLATORS (Night Hold)

Name	*Brass*	
John E. Thompson	# 75130	dropped 55½ hours in four (4) weeks Penalty—30 Days Off
Josephus Moore	# 66218	dropped 77½ hours in four (4) weeks Penalty—30 Days Off
Leo Breda	# 77849	dropped 55¾ hours in four (4) weeks—2nd offense Penalty—Six (6) Months Off
Langford Boyd	# 8984	dropped 46 hours in four (4) weeks Penalty—30 Days Off
Charlie W. Phillips,	# 69843	dropped 50 hours in four (4) weeks—2nd offense Penalty—Six (6) Months Off"

Another typical entry from the Local No. 10 Longshore Bulletin:

"LABOR RELATIONS COMMITTEE—At Labor Relations Committee meeting of Tuesday, June 18th, L. Wilderson #6546, day winch, was given 30 days off for low man out violations in the Hiring Hall. He dropped 22½ hours in four weeks.

"At the Labor Relations Committee meeting of Tuesday, June 25, 1963—Curtis Hill #67428, night winch board, was found guilty of dropping 34½ hours in 6 weeks. Second offense and 6 months off."

Mr. Robertson next informed this Court that a second such rule provided that deregistration would necessarily follow for any "B" man who had "been late in the payment of his pro-rata eight or more times." The defendants have not tired of repeating how serious an offense this ostensibly is.

Without further comment, therefore, I annex hereto as exhibits five bulletins published at various times by Local No. 10, (Exhibits "I-1", "I-2", "I-3", "I-4" and "I-5"). I invite this Court's comparison.

Wherefore, I respectfully pray that this Court deny the several motions of the defendants in all respects.

Stanley L. Weir

Subscribed and sworn to before me this 11th day of August, 1965.

(Seal) Grace G. Hackett,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires February 9, 1967.